CASES AT LAW

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

DECEMBER TERM, 1848.

NANCY TUBBS & AL. *vs.* HORATIO N. WILLIAMS, EX'R, &c.

When a debtor has been discharged under the bankrupt law, a surety, who might have come in under the commission, cannot afterwards recover from the debtor. Consequently where the surety appointed the debtor his executor, the residuary legatees of the surety cannot make the executor accountable for the debt.

Appeal from the Superior Court of Law of Pasquotank County, his Honor Judge BAILEY presiding.

This was a petition to recover residuary legacies from the defendant as executor of William D. Tubbs, in which the following case agreed was submitted to the Court.

William D. Tubbs, in his lifetime, became the surety of H. N. Williams and C. C. Green, who were merchants and partners trading in Elizabeth City, under the firm and style of H. N. Williams and Company, on a note signed by them, H. N. Williams & Co. payable to Lovey S. Pool, executrix of Thomas Pool for the sum of five thousand dollars, and interest from the 1st day of February, 1842. The said Wm. D. Tubbs, by his last will and testament, appointed the said H. N. Williams his Executor, and died in 1840. The said Williams duly qualified as executor, and took possession of the legacies bequeathed to the petitioners and others. At the Fall Term, 1842, of Pasquotank Superior Court, judgment was obtained on the said note against the said Williams and Green and against the said Williams as Executor of Wm. D. Tubbs, execution issued thereon and was subsequently enjoined. Shortly after the rendition of the said judgment on the said note, the defendant Williams was decreed a bankrupt, as was also the said Green, and received his certificate of discharge at Fall Term, 184, of the District Court of the United States for the District of North Carolina, at Edenton. The said Williams retained the possession of the negroes and other legacies, bequeathed to the petitioners, and hired them out and received the hires, according to the report of W. W. Griffin as herewith filed, up to the 1st of June, 1847. Execution issued on said judgment from Fall Term, 1842, of Pasquotank Superior Court, against H. N. Williams & C. C. Green, merchants and partners, trading under the firm and style of H. N. Williams & Co., and H. N. Williams, Executor of Wm. D. Tubbs, returnable to Spring Term 1843 of said Superior Court, which was enjoined by a writ of injunction issuing from the District Court of the United States for the District of North Carolina, at Edenton.

The plaintiff in the said execution proved her said debt regularly before the Commissioner in Bankruptcy for the County of Pasquotank, and received the dividends declared from the assignee and endorsed the same as credits on her said claim. The plaintiff in the said judgment afterwards issued her *scieri facias* against the defendant, Williams, as the executor of William D. Tubbs, on her said judgment, returnable to Fall Term, 1846, at which Term of the Superior Court of Pasquotank, her judgment was revived for the amount then due on the same, against the defendant, as the executor of W. D. Tubbs. Execution issued on the said judgment, returnable to Spring Term, 1847, of Pasquotank Superior Court, and, by virtue of which, the sheriff of Pasquotank County levied on the negroes in the hands of the defendant, as the executor of W. D. Tubbs, and which were the same given in the will of the said Tubbs to the petitioners. The negroes so levied upon were subsequently sold under a *venditioni exponas*, returnable to Fall Term, 1847, of the Superior Court of Pasquotank, issued on said judgment. As will appear by the report of W. W. Griffin, the sum of $1,556 71, assets of said W. D. Tubbs, which came to the hands of the defendant, Williams, as executor of said Tubbs, which amount arose from the legacies and were part of the legacies bequeathed to the petitioners, was applied to the satisfaction of the balance due on said judgment and execution in favor of the said Lovey S. Pool, to and upon which debt, Tubbs is admitted to have been surety only.

Now if upon the foregoing case agreed, his Honor shall be of opinion, that the defendant, H. N. Williams, notwithstanding his certificate and discharge as a bankrupt, is liable to account to and with the petitioners for the said sum of $1,556 71, applied as aforesaid to the payment of the balance due as aforesaid on the execution aforesaid, then judgment is to be rendered in favor of the

petitioners for $1776 94, with interest from the 23rd October, 1848. But should his Honor be of a different opinion, and hold that the defendant is only liable for the balance reported by said W. W. Griffin, to-wit, $220 23, then the report is to be confirmed and judgment accordingly.

His Honor being of opinion that the defendant, Williams, was only liable for the said balance of 220 23, as found and reported by said Griffin, gave judgment and decreed accordingly, from which judgment and decree, the plaintiff prayed for and obtained an appeal to the Supreme Court.

No counsel for the plaintiff in this Court.

Heath, for the defendant, submitted the following argument:

"How can Williams be held liable to Tubbs' legatees for this amount? Williams was discharged from all his debts, and of course from this; Tubbs, then, though he signed originally as surety, was, by Williams' discharge as a Bankrupt, left the sole Debtor, as much so, as if Williams had never been liable for the debt. Suppose Tubbs were living, and had paid the debt, after Williams was discharged as a bankrupt; as Williams was *discharged from the debt*, Tubbs could maintain no action against him, for the reason that Williams' discharge would bar it. And as Tubbs, if alive, could maintain no action to enforce the claim, for the reason, that the claim has no legal existence, so neither can Tubb's legatees, maintain the present proceeding to recover the amount of Lovey Pool's execution; *for*, though sueing as legatees, they are still sueing on Tubb's right.

Pearson, J. It is provided by the bankrupt act, that, under a commission against the principal, a surety may prove the debt, and the certificate is a discharge of the principal, from the cause of action or claim, as well of

the surety, as of the creditor; so that if Tubbs, the surety, was living, and had been forced to pay the debt, he could not recover from the defendant. This, it seems to us, is decisive of the case. The petitioners apply for their legacies: the defendant insists, that a large part of the assets, which would otherwise have been applicable to their legacies, has been taken by a judgment creditor. The petitioners reply, that was a debt upon which our testator was your surety. The defendant rejoins, "true! but I was discharged as a bankrupt, your testator had no cause of action against me, and you, who stand in his place, can have no higher claim."

We concur with his Honor.

The decree below must be affirmed.

PER CURIAM. Judgment affirmed.

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JONATHAN TWIDY *vs.* JESSE SAUNDERSON.

A. hired a negro from B. and gave his sealed note as follows, "On the 1st day of January, 1848, I promise to pay to B. one hundred and thirty dollars, the slave is hired on the same terms as other slaves, for the hire of the boy Evartson." *Held*, that this writing only referred to the price of the negro, and was not a memorial of any other terms of the agreement, and that, as to these latter, parol evidence was admissible.

And in such a case, in order to recover damages for a breach of the agreements, not mentioned in the note, an action on the case and not an action of covenant is the proper remedy.

Appeal from the Superior Court of Law of Tyrrell County, at the Fall Term, 1848, his Honor Judge BAILEY presiding.

This was an action on the case, in which the plaintiff proved by parol evidence, that, on the 1st of January, 1847, he hired to the defendant a negro man for the year 1847, that the agreement was made in the County of Tyrrel, and by the terms of the agreement, the defendant was not to risk the slave on water or to carry him out of the County of Tyrrell; that, at the same time and place, many other slaves were hired by other persons and the same terms were openly and expressly agreed upon by the respective parties.

The plaintiff further proved, that, during the year 1847, the defendant hired the slave to one Spruil, who carried him to the County of Martin, where the negro was killed.

This action was commenced on the 8th of January, 1848, and the plaintiff declared in case, for permitting the negro to be carried out of the county, and also in trover.

The defendant offered in evidence a note under seal, which he had executed to the plaintiff, for the hire of the negro. The note was in these words. "on the 1st day of January, 1848, I promise to pay to Jonathan Twidy, one hundred and thirty dollars, the slave is hired on the same terms as other slaves, for the hire of boy Evartson"

The defendant objected to the parol evidence offered by the plaintiff, upon the ground that it was not admissible to explain the written contract under seal. His Honor admitted the evidence.

The defendant also contended that the action was misconceived and should have been covenant and not case. His Honor held, that the action could be maintained, and instructed the jury, that, if it was a part of the contract, that the slave should not be carried out of the county, and he nevertheless was carried out of the county and killed during the time of hiring, the plaintiff was entitled to recover and the measure of the damage was the value of

the slave. The jury found for the plaintiff and assessed the damage at $832 56.

Biggs, for the plaintiff.
Heath and *E. W. Jones*, for the defendant.

Pearson, J. The case, as made up, presents but two exceptions on the part of the defendant: one as to the admissibility of parol evidence; the other, as to the form of action; and this Court is necessarily confined to these two questions, for it is to be taken for granted, that the case was made up in reference to these two questions alone.

When parties reduce their agreement to writing, it is a rule of evidence, that the parol testimony is not admissible to contradict, add to, or explain it; for although there be no law requiring the agreement to be in writing, still the written memorial is the surest evidence.

The rule is not applicable to the case under consideration, for the agreement was not reduced to writing. The note is not a memorial of the *entire* agreement, but is simply a part execution on the side of the defendant by giving a security for the price, the plaintiff having executed his part of the agreement by giving possession of the negro, leaving the terms of the agreement, as to the length of time for which the negro was hired, the clothing to be furnished, and other stipulations open for parol proof.

Admit that the note, as far as it purports to contain the agreement, excludes parol testimony; it contains the agreement as to the price, to-wit: "one hundred and thirty dollars for the hire of boy Evartson," and therefore parol evidence would be inadmissible to show, that a greater sum was to be given. It contains a general expression as to the terms, to-wit: "The slave is hired on the same terms as other slaves." These words must either be re-

jected as vague and unmeaning, or they must make a direct reference to what is out of the writing, that is, the terms upon which other negroes were hired at the same time and place, and this, of necessity, is to be ascertained by proof *aliunde*, so that the writing by its terms contemplates and makes necessary a resort to other evidence in order to ascertain the agreement. In any point of view, the parol evidence was admissible.

The next question as to the form of action is a more difficult one, and involves the necessity of deciding, whether the note under seal of the defendant contains as well the terms of agreement as the price; for, if so, the simple contract is merged in the specialty.

It is argued that the note does contain the terms of the hiring, by reference to something else, and that its legal effect, is the same as if the agreement had been set out at large, for *id certum est, quod certum reddi potest*, and that the action must be upon the deed even when it is necessary, on account of the reference, to resort to parol evidence. The reply is that the reference in this instance is so vague and uncertain as to be entirely unmeaning. If the words had been, "the slave is hired on the same terms as he was hired the year before, or as the negroes of A. B. are hired this year," the terms could be made certain; but the words "on the same terms as other slaves" announce a mere generality, unrestricted by time, place, or circumstance.

A latent ambiguity may be explained by parol evidence, as in a bequest of *my* white horse, if the testator has two white horses; it may be shown by parol evidence which of the two he meant, for the difficulty arises from a circumstance *dehors* the will; so if a deed calls for a black oak tree marked as a corner, and there be two black oak trees marked as corners, evidence *aliunde* must be resorted to to ascertain which tree was meant. Such evidence must be resorted to in every case to *fit* the *thing*

to the *description;* but if the description be uncertain, which is what is called a patent ambiguity, parol evidence is not admissible, for that would not be fitting the thing to the description, but making by parol a better one than was furnished by the writing.

We think it clear, that in this case the words in reference to the terms are to be rejected as unmeaning, and that the note does not contain the terms of hiring, except the price. We, therefore, concur with his Honor in both propositions.

It may be proper to add, that as no objection is taken to the rule of damages laid down by his Honor, we are to suppose there was evidence to authorise it, and are not to understand his Honor as ruling, that the *value* of the slave is the measure of damage as of course; for there may be circumstances, under which the slave might have been killed, and the defendant be not liable to the extent of his value, although his agreement be violated. The case does not state the manner in which the slave was killed, so as to show that the death was not a natural consequence of the slave having been carried out of the County.

PER CURIAM. Judgment affirmed.

WILLIAM C. DRAUGHAN vs. THOMAS BUNTING, & AL.

Where A. has a cause of action against another, and B. makes a parol promise to indemnify A., which promise is *superadded* to the claim, which A. has on his original cause of action, the statute, making void parol promises to indemnify against the default, &c. of another, will apply.

But, if there is no debt for which another is, or is about to be, answerable, or if the debt of the other is discharged and the promise is *substituted*, the statute does not apply.

A surety, who seeks to recover from a co-surety a ratable part of money paid, must take care to do no act, which will prevent the co-surety from having recourse against the principal. If therefore, he release the principal, it is a discharge of the co-surety.

If A. is indebted to B. and puts money in the hands of C. to pay B., B. may sue C. for money had and received to his use.

The case of *Hall* v. *Robinson*, 8 Ire. 56, cited and approved.

Appeal from the Superior Court of Law of Sampson County, at the Spring Term, 1847, his Honor Judge BATTLE presiding.

This was an action of assumpsit, in which the plaintiff declared in several counts.

1st. On a promise to indemnify the plaintiff on a note for $600.

2nd. On a promise to indemnify the plaintiff on a note for $479 43.

3rd. On a promise to indemify the plaintiff on a judgment of the Bank of Cape Fear against David Underwood, John Sellars and William C. Draughan.

4th. To receive money paid on a judgment obtained on a note endorsed by the plaintiff, at the instance and request of the testator, John Sellars, as supplemental surety, and not as co-security with said John Sellars on a note of David Underwood.

5th. To recover money laid out and expended for the use and benefit of the testator, John Sellars.

6th. To recover money had and received by the Testator, John Sellars, for the use of the Plaintiff.

The defendants pleaded the general issue and the statute of frauds. For the plaintiff it was proved, that he endorsed a note for $600, payable to the Bank of Cape Fear, in which David Underwood was principal and the defendant's testator, John Sellars, surety, which was renewed from time to time until the note for $470 43-100 was given. It was further proved, that a judgment was obtained on this note and the plaintiff was compelled to pay the sum of $278 21-100, which he sought to recover of the defendants. The plaintiff then proved by Underwood, the principal in the note, that when he applied to the plaintiff to endorse for him, he declined doing so unless he could be indemnified, which he, Underwood, promised should be done; that thereupon, John Sellars, the testator, in consideration that Underwood would convey to him a large number of slaves to secure him as his, Underwood's surety in this and other debts, for which he, Sellars, was liable as his surety, promised to indemnify the plaintiff and save him from all loss in becoming endorser on Underwood's note; that Underwood did accordingly execute an absolute bill of sale to Sellars for a large number of slaves, and the plaintiff then endorsed the note for $600, and that the negroes were afterwards sold by Sellars, and he acknowledged he had in his hands funds, with which to discharge the debt for which the plaintiff was liable as endorser. The defendants objected to the competency of Underwood as a witness to prove these facts, which objection was sustained by the Court. Whereupon the plaintiff executed to him a release, and the defendants pleaded it since the last continuance in bar of the action. A motion was then made by the defendants' counsel, that the plaintiff should be non-suited, both on the ground that they were discharged by the release, and also that the

defendants' liability, if any, was for the debt, default or miscarriage of another and not for his own debt, and the plaintiff could not recover, because the promise was not in writing as required by the Statute of Frauds.

The Court expressed an opinion that the action could not be sustained and the plaintiff submitted to a judgment of non-suit and appealed.

Badger and *W. Winslow*, for the plaintiff.
Strange, for the defendants.

PEARSON, J. We concur with his Honor, that an action cannot be maintained upon the parol promise of indemnity. That is void by the Statute of Frauds. Underwood was under a legal liability to indemnify the plaintiff, as his surety, and the promise, superadded by the intestate, comes within the words and meaning of the Statute; it is a promise to answer for the default of another, and there being a consideration makes no difference; it required no statute to make void a promise not founded upon a consideration.

The true test is, has the plaintiff a cause of action against another, to which the promise in question is superadded? If so, the statute applies. But, if there is no debt for which another is already or is about to become answerable to the plaintiff, or if the debt of the other is discharged and the promise in question is *substituted*, the statute does not apply; as when a creditor discharges a debtor, who is in custody, upon a promise of a third person to pay the debt, the original cause of the action is gone by the effects of the discharge; the new promise is *substituted*.

We are of opinion that the effect of the release was misconceived. So far as there was a cause of action arising from the relation of co-suretyship under the act of 1837, the release to the principal is a bar; for a surety, who seeks to recover from a co-surety a rateable part of

money paid, must take care to do no act, which will prevent the co-surety from having recourse against the principal; in as much as his right to contribution involves the duty of transferring to his co-surety a right to recover from the principal the amount, which he is called upon to pay. If, therefore, he releases the principal, it is a discharge of the co-surety.

The case must be viewed, as if no promise of indemnity had been made, for that is void by the statute; and so if no relation of co-suretyship had existed, for that is destroyed by the release.

There is, however, a fact in this case, to which the attention of the learned Judge seems not to have been called, which entitles the plaintiff to recover upon the count for money paid, and as the non suit was submitted to, from the intimation of his Honor, that the plaintiff could not recover upon the facts stated, the judgment must be reversed.

The intestate received property from Underwood, sold it, and acknowledged that "he had in his hands funds to discharge the debt." As soon as the intestate received the money, the bank, although it had a cause of action on the note, had a new and distinct cause of action against the intestate, upon a promise implied by law from the receipt of the money to pay the debt.

It is well settled that if A. is indebted to B. and puts money in the hands of C. to pay B., B. may sue C. for money had and received. 1 *Chitty's Pleadings, page* 4, and the cases there cited.

The plaintiff, who was forced to pay the bank, can truly allege that he has paid money which the intestate was under legal liability to pay, in consequence of the receipt of the money, and this, according to the authorities, gives him the equitable action, as it is termed, for money paid to the use of the intestate, *(Smith's leading cases,* 1 vol. 55, note and cases cited.) It cannot be ob-

jected that the plaintiff paid the money officiously, and falls under the rule, that no one can make another his debtor without his consent; for as his surety on the note he was liable to the bank, and has been forced to pay a debt, which the intestate ought to have paid.

In *Hall* v. *Robinson*, 8 Ire. 56, a surety, having paid a part of the debt out of his own funds, was held to be entitled to recover of a co-surety the amount placed by the principal in the hands of the latter to be applied to the debt, for the reason that "having received it to pay the debt he could not in conscience and ought not in law to keep it;" he was, in fact, to that amount the *real debtor*. The cause of action did not arise out of the relation of co-suretyship and depend on the act of 1807, for the principal having provided funds could not be said to be insolvent, nor was the action for a rateable proportion. That case, like the present, rested upon the broad principle, that the defendant, having raised money to pay a debt, which the plaintiff was afterwards forced to pay, was the *debtor* of the plaintiff.

Per Curiam. Judgment reversed and a *venire de novo* awarded.

JAMES AND SUSAN LEA *vs.* JOHN JOHNSTON.

The courts have no authority to have the lands of the citizens taken for a cart way, without the consent of the owner, except in the instance provided for by the Statute, "If any person shall be settled upon or cultivating any land, to which there is no public road leading or no way to get to or from the same, other than by crossing other persons' land."

Therefore where there was a public road to which access might be had, though not so convenient for the petitioner, as the cart-way he prays for, the Court cannot grant the petition.

Appeal from the Superior Court of Law of Caswell County, at Spring Term, 1848, his Honor Judge PEARSON presiding.

This was a case, originally commenced in the County Court by a petition for a cart-way, and thence carried by appeal to the Superior Court of Caswell County. The petition set forth that the petitioner, James, was the owner, and was cultivating a valuable tract of land, on which was situated a public mill on Cobb Creek, which runs through the said land; that the said land was situated about a mile and one half to the nearest point of it from Leasburg, and the mill about two miles; that he himself resided in Leasburg and had no wagon nor cart-way to his said plantation or mill, without going the Roxborough road into Person County about a half mile, and then along the Goshen Road in Person County about three miles, and then a cross road to the mill about a mile, making in all four and one half miles; and to the main part of his plantation was still farther and more inconvenient than to the mill.

And the petition further shewed that for a great many years there had been a cart and wagon way from Leasburg to his plantation and then turning from the Milton Road about half a mile from Leasburg, running through

the lands of the petitioner Susan, and the defendant John, and the petitioner James, to the mill, which said way has been stopped up by the defendant John, and he now refuses to allow any passage over that way.

The petition further stated that the said way would not only be a great convenience to the petitioner James, but also the neighborhood generally; that the citizens of Leasburg had no other way to the said mill than that described, and the neighbors on the Court house side of Leasburg were thrown still further out of the way.

The petition further set forth that the petitioner, James, had no other way of going to his said mill and land, without going over the lands of others, than as above described, and it was not necessary to establish a public road, and the petitioners prayed an order to lay off a cart-way from the Milton Road, &c.

The County Court dismissed the petition on the motion of the defendant, and the plaintiffs appealed to the Superior Court. The appeal coming on to be heard before the Judge of the said Court, his Honor ordered that judgment be entered against the defendant in the said petition for costs, and that the prayer of the petitioner be granted and that a writ of *procedendo* issue to the County Court accordingly. From which judgment the defendant appealed to the Supreme Court.

E. G. Reade, for the plaintiffs.

The petition is filed under Chap. 104, Sec. 33. Rev. St. which provides that "if any person shall be settled upon or cultivating any land to which there is no *public road leading*, and *no way to get to and from* the same other than by crossing other persons land," &c, he shall have a cart-way.

The object of the Statute is to enable land owners to use and enjoy their property to the best advantage; to *remedy* inconveniences. It is then a *remedial* Statute and ought to be *liberally* construed.

If to this it is answered that the Statute is *restrictive* of the rights of the defendant, and ought therefore to be *strictly* construed: it is replied, that the defendant is not *injured*. He is compensated in damages for all injury.

The defendant demurs to the petition and assigns two grounds.

1st. That it appears from the petition that there is a *public road leading*, &c. The showing in the petition upon which this objection is founded is, that the petitioners live in Leasburg, and own a plantation and mill about two miles off, and have no way to get to the same other than to go the public road leading to Roxborough, into Person County some half mile, and then the Goshen road some three miles, and then a cross road a mile to the mill.

It is admitted that these are *public roads*. The question is are they *a public road leading, &c.?*

If a *strict* construction is insisted upon by the defendant, it will be difficult to make *three* roads *a* road.

If a *liberal* construction is allowed, it cannot be said that these roads are a road, *leading* from Leasburg to the mill. If a stranger were to enquire whether there is *a rail road leading* from Raleigh to Wilmington, and he were answered affirmatively, he would doubtless be deceived; and yet there is a rail road which begins at Raleigh and unites with a second rail road, which intersects with a third, which ends at Wilmington. But with no propriety can there be said to be *a rail road leading* from Raleigh to Wilmington.

A road leading from one place to another is a *direct* way—direct enough for all ordinary purposes. And it would be nothing but a whim, too idle to be gratified, to desire any other way than *a public road*. But the same cannot be said of *several roads*, which by a circuit of

many times the distance, end at or pass by the point to which a *direct* way is desired.

2nd. That it appears from the petition that the petitioners have *a way*, &c., viz: the roads aforesaid.

To this it is answered, that it must be a *direct* or at least *convenient* way. And it is insisted by the plaintiffs that when there is no public road leading, &c., (as it is submitted there is not in this case,) then the *other way* spoken of in the statute, is a way across the petitioners' *own land*. The words are, "and no way, &c. other than by crossing *other persons'* lands," which must mean no way over *his own* land. So that it is submitted by the plaintiffs,

1st. That it does not appear from the petition that there is a public road *leading*, &c.

2nd. That it does not appear from the petition that there is *a way*, &c. other than by crossing other persons' land, (viz:) a way over petitioners' *own land*.

Kerr and *Norwood*, for the defendant.

Pearson, J. When this case was heard on the circuit, I was so entirely satisfied that the cart-way petitioned for would be a matter of great convenience to the petitioners, and other citizens of Leasburg and its vicinity, by giving them a road to mill not exceeding two miles in distance, instead of a round-about road, over bad ground, exceeding four miles, that my attention was directed from a particular examination of the Statute, and I contented myself with a general impression, that the meaning of the Act was to establish a third sort of road, called a cart-way, intermediate between a public road, which was to be kept up at the public expense and used by all the citizens, and a mere private way, which, when acquired by grant or prescription, was to be used by the grantee and those having his estate.

After the argument in this Court, and by the assistance

of the great learning and long experience of the Chief-Justice and my brother Nash, I have satisfied myself that I was wrong. "Hard cases are the quick-sands of the law;" in other words, a Judge sometimes looks so much at the apparent hardship of the case, as to overlook the law.

However convenient it may be, in many instances, to have a cart-way, when it may not be necessary to establish a public road, we are unable, by the most liberal construction of the Act, to find any authority given to the Courts to have the land of the citizens taken without the consent of the owner for the purpose of a cart-way, except in the instance expressly provided for, "If any person shall be settled upon or cultivating any land, to which there is no public road leading and no way to get to and from the same, other than by crossing other persons' lands." In this case, there is a *public road leading to the mill and land* of the petitioners; it, therefore, does not come within the words of the Act, and if we depart from the words, there is no stopping short of an unlimited discretion by which the land of one man may be taken for the use of another. To authorise this, there should be a plain expression of the Legislative will. In the absence of such provision, individuals must be left to depend upon the courtesy of good neighborship or the acqusition, by grant, of the right of private ways.

Let the decision of the Court below be reversed and the petition be dismissed with cost.

PER CURIAM. Decreed accordingly.

THE STATE TO THE USE OF JACOB HUBBARD vs. STEPHEN WALL.

When a claim was put into a constable's hands for collection, during the year 1839, and he was guilty of a breach of duty in not collecting it during that year, and he was reappointed for the year 1840, and the claim still remaining in his hands, he was again guilty of a similar breach of duty; *Held*, that the party injured had his election to sue on the bond of either year, or on both bonds.

Held further, that the circumstance that the party injured had it in his power to recover on the second bond, if he had chosen to do so, did not mitigate the damages he had a right to recover on the first bond.

A constable is the agent of the creditor only during the year he continues to be a constable. For his receipts after that period the creditor is not chargeable.

The cases of *State to the use of Miller* v. *Davis*, 7 Ire. 200, and *Respass* v. *Johnson*, 7 Ire. 77, cited and approved.

Appeal from the Superior Court of Law of Richmond County, at the Fall Term, 1848, his Honor Judge PEARSON presiding.

This is an action of debt on a constable's bond, to recover the amount of a claim put in his hands for collection; and the breaches assigned were—failing to collect, collecting and not paying over, and not returning the note.

It was shown, that on the 16th day of April, 1839, one Sedbury, being appointed a constable for one year, executed the bond sued on, and the testator, Wall, was one of his sureties. On the 1st day of February, 1840, the relator placed in Sedbury's hands, for collection, a note due to him by John and James McAlister, for $75, and took his receipt to collect or return as constable. The plaintiff proved that James McAlister, one of the obligors, had property out of which the money might have been collected; that in June, 1841, Sedbury ran off from the

country; that in 1845, a short time before the writ issued, he made a demand of the testator. The defendant proved, that, on 15th day of April, 1840, Sedbury was again appointed constable, and executed the usual bond with surety for that year; that, in May, 1841, Jane McAlister paid to Sedbury, who still had the papers, and ran off a short time afterwards, the sum of seventy-five dollars ($75) in part payment of the debt.

It was admitted, that, in 1842, the bond, which is now sued on, was put in suit by Alexander Little, as relator, who had put claims in Sedbury's hands; that the testator, who was the defendant in that action, relied upon the defence, that the record of Sedbury's appointment was defective, and obtained a verdict on the plea of *non est factum*, on which there was judgment, and, upon an appeal to the Supreme Court, the Judgment was affirmed. The defendant's counsel insisted, 1st That the effect of the verdict and judgment of the Supreme Court, was a rejection of the bond by the sovereign power, and therefore the Act of 1844 could not have the effect to re-instate it as a bond. 2nd, That the verdict and judgment operated as an estoppel and barred this action. 3rd. That as Sedbury was appointed constable in April, 1840, and continued to hold the paper, the action should have been on the bond, given in 1840, and not on the bond of 1839. 4th, That, if the plaintiff could recover on the bond of 1839, for failing to collect from the 1st of February, 1840, to the 16th April, 1840, the damage should be nominal, or at most, only twenty-six dollars and forty-five cents, ($26 45) the balance of the relator's debt, after deducting the $75 paid by Jane McAlister, in May, 1841.

The Court was of opinion against the defendant on all the points, and thought the relator entitled to recover the whole of his claim, inasmuch as the payment of the $75 was made after Sedbury's second year had expired. There was a verdict for the plaintiff. Motion for new trial

for error, refused; and judgment, and appeal to Supreme Court.

Winston, for the plaintiff
Strange, for the defendant.

Pearson, J. There is no error in the proceedings of the Court below. The first and second exceptions are clearly untenable, and were not pressed in this Court.

Although Sedbury was re-appointed in 1840, and continued to hold the paper, so that there was a clear breach of the bond given for that year, this did not amount to a release of any cause of action, to which the plaintiff was entitled upon the bond given for the year 1839.

It is true, as is held in *State to the use of Miller* v. *Davis*, 7 Ire. 200, "the different bonds given by a constable are not cumulative, as in the case of guardians, but are distinct and separate, each to secure the performance of the duties stated in them;" that is, the bonds are not given to secure the performance of the same duties, but of different duties; still, if there be a breach of both bonds, the plaintiff has his election and can sue upon either or both.

The neglect to collect or take any steps, for two months and a half after the paper was put into his hands, was a breach of the bond given in 1839; and the only question is, as to the amount of damages. The plaintiff has lost his entire debt; but the defendant says, the fact, that he has a remedy upon the bond of 1840, should go in mitigation and reduce the damages to a nominal amount. If the plaintiff had pursued his remedy and obtained satisfaction upon the bond of 1840, it would go in mitigation, but it is difficult to conceive how his damages can be lessened, merely because he has a remedy upon another bond. So if the plaintiff had received the money or any part of it from his debtor, or if it had been receivable by

Sedbury during his second year, when he was the agent of the plaintiff, and authorised to receive it, that would go in mitigation, as is held in the case above cited.

But the money was not received by Sedbury until he went out of office and had ceased to be the agent of the plaintiff. The new contract of agency, implied from his reappointment, and his being allowed to keep the papers the second year, terminated with his official year. A constable is the creditor's agent, only during the year he continues to be a constable. *State to the use of Respass* v. *Johnson*, 7 Ire. 77. The law will not imply an agency for a longer time than the appointment, which gives rise to it, is to continue.

PER CURIAM. Judgment affirmed.

DOCTOR COLE *vs.* WILLIAM HESTER.

When the contract is for the delivery of a certain quantity of Tobacco, deliverable at a certain place and for a certain price, in order to entitle the purchaser to recover for a breach of the contract, he must allege and prove that he was ready to perform his part of the contract.

Where it appeared that A. raised the Tobacco on his mother's land, and was to have one sixth for his labor, &c.; *Held*, that A. was not a tenant in common with his mother, as to one sixth, and had no property in it or lien on it.

The case of *State* v. *Jones*, 2 Dev. & Bat. 544, cited and approved.

Appeal from the Superior Court of Law of Franklin County, at the Spring Term, 1848, his Honor Judge CALDWELL presiding.

This is an action of assumpsit to recover damages for the breach of a contract, because of the non-delivery of a crop of tobacco, alleged to have been sold by the defendant to the plaintiff in the winter of 1845.

Several witnesses testified that they heard the defendant say, he had sold his crop of tobacco to the plaintiff for four dollars per hundred, to be delivered at the Franklinton depot. A witness, introduced by the plaintiff, testified that he went with him to the plantation of one Mrs. Hester, the mother of the defendant, and where he lived as an overseer, to see him in relation to the tobacco, about the 1st of April, 1845; that the defendant was prizing it; that the plaintiff said, "are you going to let me have your Tobacco?" that the defendant replied, "our contract was, that you were to get Kennedy's Tobacco, and by the sale of it, get money to pay me, and as you failed to get it, I concluded to prize mine, and I shall go on with it;" that the plaintiff rejoined, that made no difference, for he could pay the money without getting Kennedy's tobacco; that the plaintiff then offered defendant twenty cents per hundred for the prizing he had done—to which the defendant did not assent.

Another witness, on the part of the plaintiff, testified, that, in March, 1845, the defendant came to the plaintiff's factory at Franklinton—that witness said: "What! are you come to get off too?" the defendant said, "no, I have come to get tighter on;" that the plaintiff and defendant had a conversation to one side, and he heard the plaintiff say to defendant, "as soon as I get Kennedy's tobacco, prize it and send it off; I will be ready to take yours." Several witnesses testified that tobacco had risen in price between the winter and 1st of April, 1845, and all proved that the defendant lived with his mother as an overseer and was to have the one sixth of the crop for his wages, and that he raised no other crop; also, that he had been acting as his mother's agent and selling her crops for

some two years, and that this was generally known in and about Franklinton. It also appeared, that, in the Winter and Spring of 1845, the plaintiff was reported to be in failing circumstances.

There was no evidence that the plaintiff had got Kennedy's tobacco or any part of it.

The defendant insisted that his obligation to deliver the tobacco depended on a contingency, that had not happened, namely: the failure on the part of the plaintiff to get Kennedy's tobacco; and he was therefore not liable on this part of the case. And further, that the contract was made by him as the known agent of his mother, and the suit ought to have been brought against her. The plaintiff, on the contrary, insisted that the contract did not depend on any condition or contingency, that it made no difference if the plaintiff were able to pay when the tobacco was delivered. And, on the other *ground*, the plaintiff insisted that the contract was an individual one with the defendant; but, even if it were otherwise, he was entitled to recover for the non-delivery of one sixth of the tobacco, though there was no evidence that the crop had been divided and the defendant's portion set apart to him. The Court charged that if it were the contract between parties, that the defendant must deliver the tobacco at Franklinton depot apart from any condition or contingency, it was the duty of the defendant to tender it there within a reasonable time; and if he failed to do so, the plaintiff would be entitled to damages, the measure of which would be the difference between the contract price and the rise in the price, if any had taken place, and if no rise had taken place, plaintiff would be entitled to recover at least nominal damages. On the other point, the Court charged, if the contract were that the delivery depended on the plaintiff's getting Kennedy's tobacco, prizing it and selling it off, and the plaintiff had not procured said tobacco, the defendant would be en-

titled to their verdict. And the Court also charged, that if the contract were made with the defendant as the agent of his mother, that the plaintiff could not recover, even for the one sixth of the crop. The jury returned a verdict for the defendant.

A new trial was moved for and refused, and the plaintiff appealed.

Busbee, *McRae* and *Miller*, for the plaintiff.
Gilliam and *W. H. Haywood*, for the defendant.

Pearson, J. The first proposition laid down by his Honor, is too general, and ought to have been qualified. If the contract was unconditional, and the defendant had failed to deliver the tobacco, the plaintiff was entitled to recover, *provided*, he was ready and able to pay the price. The delivery of the tobacco and the payment of the price, were concurrent acts; and, to entitle the plaintiff to recover, it was necessary for him to aver or prove that he was ready to perform his part of the contract. The plaintiff, however, cannot complain of this error as it was in his favor.

The second proposition, "if the contract was, that the delivery of the tobacco depended on the plaintiff's getting Kennedy's tobacco, prizing it and sending it off, and plaintiff had not procured said tobacco, the defendant would be entitled to a verdict," is certainly true. There was some evidence tending to shew that the contract depended upon the plaintiff's getting Kennedy's tobacco, but the evidence was slight, and we cannot help thinking, that if particular instruction had been asked for, and the attention of the jury had been directed to the distinction between what circumstances enter into and form a part of a contract, so that the contract may be said to depend on them, and what are merely collateral, the jury would have arrived at the conclusion, that the contract in this

case did not depend upon the plaintiff's getting Kennedy's tobacco, so as to make that a condition precedent. If A. agrees to buy the tobacco of B. provided he can borrow five hundred dollars from C. the agreement is conditional; it depends upon A's being able to brrow the money from C. But if A. agrees to buy the tobacco of B., and, by way of assuring B. that he will be able to pay for it, A. tells B. that he expects to borrow money from C., this is a mere collateral circumstance—the contract does not depend on it. It makes no difference how A. gets the money; it is sufficient if he has it ready.

This point does not seem to have been made at the trial, and is not presented by the case as made up; for which reason, the plaintiff cannot have the benefit of it.

The third proposition, "if the contract was made with the defendant, as the agent of his mother, the plaintiff could not recover, even for one sixth of the crop," is unobjectionable. The mother owned the whole crop, the defendant was not a tenant in common as to one sixth, he had no property in it or lien upon it—*State* v. *Jones*, 2 Dev. & Bat. 544—and might well sell the whole as her agent, and look to her for his sixth part of the price.

Per Curiam. Judgment affirmed.

LOUIS A. NIXON *vs.* HENRY NUNNERY.

In a proceeding under the insolvent laws, when the debtor has been arrested on a *ca. sa.*, it is too late for him, after giving bond and joining in an issue of fraud, to take exception to the writ of *ca. sa.*

Although the *ca. sa.* may be void, yet the Court has jurisdiction of the subject matter, and objections to any part of the proceedings must be made in apt time.

When the creditor alleges fraud, if his specification be not sufficiently certain and a defendant, before issue joined, objects to it, and the Court should refuse to make it certain, it would be error. But an objection to the specification is too late after issue joined. The verdict cures the defect.

The rule is that the verdict cures all omissions or defects, which must necessarily have been passed upon by the jury.

A verdict is not too vague, when it responds to the issue.

It is not necessary that the land, alledged to have been fraudulently conveyed by the debtor, should be over the value of ten dollars. The law does not permit the debtor to convey, with intent to defraud, land, or any other *visible* property, no matter how small the value.

Appeal from the Superior Court of Law of Cumberland County, at the Fall Term, 1847, his Honor Judge CALDWELL presiding.

This was a proceeding upon a *ca. sa.* returned originally to the County Court, where the proceedings were ordered to be dismissed upon the motion of the defendant, and from this judgment an appeal was taken to the Superior Court. In this Court the following specifications on a suggestion of fraud were made by the plaintiff, to-wit, "That the defendant, Henry Nunnery, conceals and now is the owner of horses, cows, ton timber (several thousand feet,) four mules, notes, judgments and accounts, and that he is also the owner of land or has an interest in land."

The following issues were submitted to the jury, (the two first not necessary to be inserted, as the jury found on them for the defendant;) 3rd. Did the defendant own

land or any other interest therein at the time of issuing the *ca. sa.*? 4th. Did the defendant convey any land with intent to defraud his creditors since the issuing of the *ca. sa.*? 5th. Did the defendant convey any land with intent to hinder, defraud or delay the plaintiff in this action, since the issuing of the *ca. sa.*?

The jury found the 3rd, 4th and 5th issues in favor of the plaintiff: that is to say, that the defendant did own land, and did convey land with intent to defraud his creditors since the issuing of the *ca. sa.*, and they further found that the defendant did convey land with intent to hinder, delay and defraud the plaintiff in this action, since the issuing of the *ca. sa.*

Upon the trial the defendant moved to quash the proceedings upon the ground that the *ca. sa.* was void. The Court being of opinion that the defendant had waived any irregularity, by joining in the issue tendered by the plaintiff, refused the motion to quash; and for the further reason that the motion to dismiss had been heretofore adjudicated in this Court. Upon the charge of the Court, the jury returned a verdict in favor of the plaintiff. The defendant then resisted the judgment upon the ground that the finding of the jury was too general and indefinite. The Court overruled the objection, and gave judgment that the defendant be imprisoned, &c. From this judgment, the defendant appealed to the Supreme Court.

W. B. Wright and *Husted*, for the plaintiff.
D. Reid, for the defendant.

PEARSON, J. There is no error in the proceedings of the Court below.

After giving bond, and joining in an issue of fraud, it is too late to take exception to the writ of *ca. sa.* This is settled by more than one case.

The defendant's counsel attempted to distinguish this case, by insisting that the *ca. sa.* was not simply irregular, but void; that a void *ca. sa.* cannot confer jurisdiction, and that jurisdiction could not be acquired by express consent, much less by consent implied from a waiver or neglect to take exception in apt time.

If the Court derived its jurisdiction from the *ca. sa.*, there would be force in the argument. But jurisdiction of the subject matter is conferred by law; the *ca. sa.* and bond are only the means or process to bring the party into Court. Any defect in process may be waived.

The argument proves too much, if the Court, when a *ca. sa.* is void, has no jurisdiction and the proceeding is a nullity. Debtors, who have taken the oath and been discharged, may be arrested again. And should they rely upon the discharge, the answer will be, it is a nullity; the *ca. sa.* was void, and the Court had no jurisdiction.

The next objection is, that the specification was too vague, as no particular land was set out. Specifications are not required by statute, but have been adopted by the Courts, to aid defendants and inform them to what to direct their proofs.

If a specification be not sufficiently certain, and a defendant, *before issue joined*, objects to it, and the Court should refuse to require it to be made certain, it would be error. But if a defendant does not object, and goes to trial, it is too late—he has taken his chance. The verdict cures the defect, for it must be taken for granted that evidence was offered which proved that the defendant had conveyed some particular land with an intent to defraud, otherwise a verdict could not have been rendered. The rule is that a verdict cures all omissions or defects, which must necessarily have been passed upon by the jury.

A declaration in trespass, for breaking the plaintiff's close in the county of Wake is not too general, unless by

special plea the plaintiff is forced to re-assign. So, trespass for an assault is not too general, if defendant will go to trial on the general issue.

The last objection is, that the verdict is too vague, because it does not describe any particular land, or find that the value is over ten dollars. The verdict is responsive to the issue. But it was argued that the land should have been identified, to enable the defendant to make a "full and fair disclosure."

The law punishes the defendant for his fraud by imprisonment; it does not undertake to enable him, by a verdict, to make a "full and fair disclosure." When he applies a second time for the benefit of "the Act," he is to make a clear conscience, under the penalty of a second imprisonment.

If the specification and verdict be certain, and the defendant makes a disclosure coming fully up to it, still if the plaintiff is able to show any other property, which has been fraudulently conveyed, the defendant will be again imprisoned, until he makes a "full and fair disclosure," which is a condition precedent to his discharge.

The other ground is equally untenable. The Act does not allow a debtor to convey, with an intent to defraud, land or any other visible property to the value of one cent. It provides, if the debtor has no *visible* estate, real or personal, and shall make oath, that he hath not the worth of ten dollars in any worldly substance, either in debts owing to him or otherwise, over and above his wearing apparel, &c., and that he hath not at any time since, his imprisonment or before, directly or indirectly, sold or otherwise disposed of, *any part of his real or personal estate*, to defraud, &c.

This language need only to be read to be understood.

Per Curiam. Judgment affirmed.

JOHN B. FREEMAN *vs.* JOSHUA SKINNER.

Where A. contracted to deliver to B. one hundred fish stands of a certain description, and upon tendering them, B. received fifty, but refused to receive the other fifty, because they were not made according to the contract; *Held*, that this receipt of the fifty stands did not make B. responsible for the other fifty, which were not made according to the contract.

Appeal from the Superior Court of Law of Bertie County, at the Fall Term, 1848, his Honor Judge BAILEY presiding.

The plaintiff agreed to make for the defendant one hundred fish stands, and to deliver them at Colerain, a fishery on the Chowan, between the first and twentieth of March, 1848, at the price of one dollar and fifty cents a piece. The stands were made and delivered within the time specified, and the defendant received fifty of them, not in person, but by an agent. The case states that the stands were not made agreeably to contract, and the defendant refused to receive the remaining fifty.

His Honor, the presiding Judge, instructed the jury, that if the plaintiff made the stands according to contract and delivered them at Colerain, within the time specified, he had a right to recover the amount the defendant agreed to pay; that if they were not made according to contract, and the defendant had received fifty of them, then they should find a verdict for whatever they were worth. The jury found a verdict for the plaintiff for the sum of $134 69-100, of which $125 was principal.

Judgment being rendered accordingly, the defendant appealed.

Biggs, for the plaintiff.
Heath, for the defendant.

NASH, J. There is much want of precision and clearness in the statement of the alternative portion of the charge. By the rules of grammar, the last relative pronoun *they* ought to refer to the next antecedent, with which it is connected, that is, fifty stands. But such was not the understanding of the jury. If it had been, they could not have given the plaintiff damages for a sum exceeding seventy-five dollars, for that would have been the price of fifty stands, if made agreeably to contract; on the contrary, they have given him one hundred and twenty-five dollars as the value of the casks received by the defendant. The jury must have understood the Court, as instructing them, that the defendant, by receiving a part of the stands, had made the whole number his, and was bound to pay for the whole, although the remaining fifty were not made according to contract. That they must so have understood the charge, is manifest from the fact, that they allowed the plaintiff damages to the amount of $125, as the value of the stands he was bound to pay for. Now they could not have valued the fity stands which the defendant had taken, at that price, for at one dollar and fifty cents per stand—the stipulated price—they could have been valued at but seventy-five dollars. But the jury had said, that the whole one hundred were defectively made, and not according to the contract. They must then have valued the whole lot, upon the principle that the defendant had, by receiving fifty stands, received the whole and was bound to pay for the whole, what they were worth. If it was not the intention of his Honor so to charge them, he should have rectified their misconception of his meaning; if he did so intend, he erred in point of law. The stands were delivered at the place and within the time specified; upon inspection, they were found to be made not according to the contract. The defendant might have refused to re-

ceive any of them, and the plaintiff would have had no right to complain. But he did take such a portion of the stands, as were made nearest to his agreement—refusing the remainder. This he did, without objection from the plaintiff. The contract was for one hundred stands, at the price of one dollar and fifty cents per stand, and not for one hundred and fifty dollars. The stands were to be delivered between the first and twentieth of March. Suppose the plaintiff had delivered to the defendant fifty of them at one time, made as he had contracted they should be made, and on another day tendered fifty more, badly made, not coming up to the contract, would the defendant have been obliged to receive them, though badly made? Certainly not. If by receiving the first fifty, he was bound to receive the last, it would be because, he had precluded himself from refusing them, having already accepted them. The defendant, by receiving the fifty stands, did not receive the other fifty, and is only bound to pay for them what they were worth.

There was then error in his Honor's charge.

Per Curiam. Judgment reversed and a *venire de novo* awarded.

JACOB HAMLIN vs. WILLIAM B. MARCH.

The law requires that a writ (as in this case on execution) shall be returned to the Court and not to the Clerk.

It is true the Clerk is the officer of the Court to receive the writ, and whatever may be raised upon it, as his office is the place, where the records of the Court are kept and preserved.

If the Clerk will not receive the return, when tendered to him, the officer, to discharge his duty, must return the precept and the money, if he has made it, to the Court. They will, upon a proper representation, make such order, as the case may require, and, in a proper case, direct their officer to receive the process.

The death of the Clerk during term time, is no excuse for not making the return.

Appeal from the Superior Court of Law of Davie County, at the Fall Term, 1848, his Honor Judge MOORE presiding.

Under the proceedings in this case, the plaintiff seeks to recover from the defendant, who is the Sheriff of Davie County, one hundred dollars, the penalty given by the Act of 1836, ch. 109, sec. 18, for not returning process. It appears that the plaintiff recovered a judgment in the County Court of Davie, at May Term, 1845, against Nathan Hamlin, upon which a *fieri facias* issued, returnable to August Term following, which in due time came to the hands of the defendant's deputy, who collected the money. Early in the term of the Court, to which the writ was returnable, the plaintiff applied to the deputy, in whose hands the process was, for his money; which he refused to pay to him. On Wednesday evening of the Term, the deputy, with the plaintiff, went to the Clerk of the Court, and the former offered to return the process and pay the money to him. The Clerk remarked he was then busy and directed the plaintiff to call at his office

the latter part of the week and he would then receive his money. At this time no return was endorsed on the execution. The Clerk was taken ill on Friday evening and died on Saturday—on both of which days, the plaintiff attended at the Court House, to get his money. On the Monday following, the deputy stated he had not returned the *fi. fa.* During the August Term, the plaintiff obtained a judgment *nisi* for the penalty given by the Act, against the defendant, for not making a due return of the writ. Upon that judgment, the *sci. fa.*, in this case issued. On the execution was endorsed, "August Term," &c. To the *sci. fa.* the defendant pleaded *nul tiel* record, tender to the Clerk and refusal, death of the Clerk during Term.

The Court adjudged there was such a record and submitted the other issues to the jury, instructing them to ascertain from the evidence whether the defendant did return the execution in due time, as he was required by law. If they found he had done so, the plaintiff was not entitled to recover. The jury were further instructed that the offer by the deputy to return the execution to the Clerk, on the Wednesday evening of the Court, was not sufficient to discharge him from the penalty, unless the plaintiff had agreed to enlarge the time, within which the sheriff was required by law to make the return. If the plaintiff had so agreed, the defendant was entitled to their verdict. The jury found a verdict in favor of the plaintiff, and the defendant appealed from the judgment thereon.

Rufus Barringer, for the plaintiff.
Lillington, for the defendant.

NASH. J. We do not concur with his Honor, the presiding Judge, in the charge he gave to the jury. In the first part of it, he submits to them to ascertain whether the process had been duly returned according to law.

The defendant had not tendered such a plea. If he had, it would have been the province of the jury to ascertain the existence of the facts relied on as constituting a return, and the duty of the Court to instruct them, as to their sufficiency in law to have that effect. So, with respect to the other portion of the charge. The jury was instructed, if the plaintiff had concluded to enlarge the time, within which the defendant was to make his return, it would be a discharge. There was no such defence made by the pleas. These, however, are errors, if they be such, which operate no injury to the defendant; for, from the case agreed, the plaintiff is very clearly entitled to judgment against him according to his *sci. fa.*

We are entirely satisfied, that neither of the pleas to the country can avail the defendant. The first is, that he had tendered the execution to the Clerk, who had refused to receive it; the second, that the Clerk died during the term, meaning, we presume, that, in consequence thereof, he was unable to make a return. To these pleas, the plaintiff might and ought to have demurred. If true, they were no answer to the charge. The law requires that the writ shall be returned to the Court and not to the Clerk. The language of the *fi. fa.* is, "and have you the said moneys, besides your fees for this service, before our said Court to be held, &c. on &c., and have you *then* and *there* this writ." The precept then is to be returned to the *Court*, from which it issued, and not to the Clerk. It is true the Clerk is the officer of the Court to receive the writ, and whatever may be raised upon it, as his office is the place where the records of the Court are kept and preserved. If the Clerk will not receive the return, when tendered to him, the officer, to discharge his duty, must return the precept and the money, if he has made it, to the Court. They will, upon a proper representation, make such order, as the case may require, and in a proper case, direct their officer to receive the process. That

this is so is shown by the fact, that if, as in this case, the Clerk should suddenly die, it would exonerate the sheriff from making any returns whatever, until another Clerk should be chosen—thereby much loss might be sustained, not only by plaintiffs in execution, but by other suitors. Neither then was the tender to the Clerk, and his refusal to receive the process, a due return by the defendant, nor was his death any excuse.

PER CURIAM. Judgment affirmed.

THE STATE *vs.* JAMES A. JONES.

An indictment, which charges that "A. B. late, &c., at, &c., with force and arms, on &c., did publicly curse and swear and take the name of Almighty God in vain, for a long time, to-wit: for the space of two hours, to the common nuisance of all the citizens of the State, and against the peace and dignity of the State," cannot be supported.

To render the offence of profane swearing indictable, the acts must be so repeated and so public, as to become an annoyance and inconvenience to the public, for then they constitute a public nuisance.

It is not sufficient to the conviction of a defendant in such an indictment, that the State should shew by its evidence, that the defendant has been guilty of a nuisance; the indictment must charge it; it must set forth specially the whole fact with such certainty, that the Court may be able to see, judicially, that it rests on sufficient grounds. Nor will it be sufficient, if the indictment charges, that the acts were done "to the common nuisance of all the good citizens of the State," unless the facts so charged amount in law to a nuisance.

The cases of the *State* v. *Ellar*, 1 Dev. 207, *State* v. *Deberry*, 5 Ire. 371, *State* v. *Waller*, 3 Mur. 229, *State* v. *Brown*, 3rd Mur. 224, and *State* v. *Baldwin*, 1 Dev. & Bat. 195, cited and approved.

Appeal from the Superior Court of Law of Rockingham County, at the Fall Term, 1848, his Honor Judge CALDWELL presiding.

This was an indictment for a common nuisance. It appeared on the trial of this prosecution, that a quarrel took place in Madison, a village of Rockingham, between the defendant and another individual; that the defendant was drinking, and after the quarrel and separation of the parties, he cursed and swore in a loud tone of voice for some time—that he used very profane language, calling the name of Almighty God in vain—that his especial abuse was directed at the individual in question, and his family—that the house of the said individual was situated two hundred yards from where the defendant was—that the said individual and his family were disturbed thereby—that so loud was the cursing and profane swearing of the defendant, he was heard throughout the said village, and that his conduct was well calculated to disturb the citizens thereof.

The Court charged the Jury, if they believed the witnesses, they ought to convict the defendant. The jury returned a verdict of guilty. The defendant moved for a new trial, because of misdirection, which was refused. Judgment was pronounced and the defendant appealed.

Attorney General, for the State.

No counsel for the defendant.

NASH, J. The indictment in this case charges, "that James A. Jones, late of, &c., at &., with force and arms in said County, on the 25th day of March, 1848, did publicly curse and swear and take the name of Almighty God in vain, for a long time, to-wit: for the space of two hours, to the common nuisance of all the citizens of the State, and against the peace and dignity of the State." The indictment further charged the defendant with going armed with a loaded gun, during the same time. The defendant was convicted.

For single acts of profane swearing, the laws of this

State have provided a remedy, which is, by the legislative power, deemed adequate to its punishment, to-wit: a fine for each act, to be imposed by a single magistrate, upon conviction before him. *Rev. Stat. Ch.* 118, *Sec.* 2. To render the crime indictable, the acts must be so repeated and public, as to become an annoyance and inconvenience to the public, for they then constitute a public nuisance. *State* v. *Ellar*, 1 Dev. 207. *State* v. *Deberry*, 5 Ire. 371. The perpetration is, in that case, subject to an indictment. Thus, if a man is an habitual profane swearer and indulges in the vice in public, so as to become an annoyance and inconvenience to the public, in the language of Chief-Justice TAYLOR in *Ellar's* case, or to become inconvenient and troublesome, in that of Judge GASTON in *Baldwin's* case, 1 Dev. & Bat. 197, he commits an offence against the criminal law and is indictable. *State* v. *Waller*, 3 Mur. 229. But it is not sufficient to the conviction of the defendant, that the State should show by its evidence that the defendant has been guilty of a nuisance—the indictment must charge it—it must set forth specially the whole fact, with such certainty that the Court may be able to see, judicially, that it rests on sufficient grounds. Nor will it be sufficient, if the bill charges, that the acts were done "to the common nuisance of all the good citizens of the State," unless the acts so charged, in law, amount to a nuisance. This is shown by the authorities, before referred to. In *Waller's* case, the charge was, that the defendant "was a common, gross, and notorious drunkard," &c, and "on divers other days and times," &c., "got grossly drunk and committed open and notorious drunkenness." Judgment was arrested, because drunkenness becomes amenable to the municipal law as a crime, only when it is practised openly and in the view of the public, which was not charged in the indictment. The case of *Ellar*, is a stronger one, and more directly in point. There, the charge was, that

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the defendant, being an evil disposed person, "did, in the public street of Jefferson, profanely curse and swear and take the name of Almighty God in vain, to the evil example," &c., and "to the common nuisance of the good citizens of the State." There the judgment was reversed, because the indictment did not charge, that the defendant was a common profane swearer, and did not set forth acts, amounting to a common nuisance. This decision took place in 1837, and has ever since been followed and considered as sound and correct. It has been repeatedly decided by this Court, that profane swearing is not punishable by indictment, in this State, when committed in single acts; but to make it so, it has been intimated by several Judges, it must be perpetrated so publicly and repeatedly, as to become an annoyance and inconvenience to the citizens at large. *State* v. *Brown*, 3 Mur. 224. *State* v. *Baldwin*, 1 Dev. & Bat. 195. In the case before us, the indictment does not charge the defendant with being a common and notorious profane swearer. Neither do the acts set forth in themselves imply, necessarily, that they were done in public, so as to be an annoyance to the citizens at large. For any thing appearing on the indictment, in connection with this charge, the cursing and swearing might have been on the public highway, and not in the hearing of any person whatever. We have seen that the word public or publicly, will not supply the averment of the presence of people to be annoyed; for if the act complained of can be considered free from legal guilt, it shall be so considered, until the contrary is made to appear. We consider the act, set forth in the indictment, as coming under the statute punishing profane swearing by a penalty.

The indictment further charges, that the defendant "did then and there go armed with and carry a certain gun, loaded with powder and lead, to the great terror of all

the good citizens then and there assembled." Upon this charge no evidence was given.

The appeal in this case was for error, in the charge of his Honor, the presiding Judge. For the same reason, upon which we have held the indictment insufficient, we must hold the evidence did not establish an indictable offence.

Judgment must, therefore, be reversed and a *venire de novo* awarded.

PER CURIAM. Ordered to be certified accordingly.

N. W. ARRINGTON *vs.* BENJAMIN SCREWS.

A legacy in the hands of an executor, due to a married woman, cannot be attached for a debt of the husband. It is not his until he reduces it into possession.

Process of attachment operates only on such interests of the debtor, as exist at the time it is served, and not on such as may afterwards arise.

The cases of *Gentry* v. *Wagstaff*, 3 Dev. 270, and *Flynn* v. *Williams*, 1 Ire. 509, cited and approved.

Appeal from the Superior Court of Law of Nash County, at the Fall Term, 1848, his Honor Judge Dick presiding.

This is an action of debt, commenced by original attachment. The case is this. Peter Arrington, deceased, bequeathed the sum of $300 to each of his grand children, Mary Drake, Adeline Drake, Richard Drake, and Mourning Screws, the wife of the defendant, with the following limitation over: "It is my will, if either of my said grandchildren die without leaving issue, then the property

given to such one, be equally divided between the survivors." The legacies were paid to the grand-children respectively; and afterwards Adeline died intestate, without having had issue, and leaving the others surviving, and Kelly Rawls became her administrator, and received assets to a greater value than $300; and, being summoned as a garnishee in this suit, he stated the above case in his garnishment.

The plaintiff moved for the condemnation of one third part of the sum towards the satisfaction of his recovery; but the motion was refused and the garnishee discharged; and the plaintiff appealed.

Miller, for the plaintiff.
B. F. Moore, for the defendant.

RUFFIN, C. J. The Court concurs in the opinion of his Honor. An attachment may be served in the hands of any person indebted to the defendant or having any of his effects. But this interest of Mrs. Screws in the hands of her sister's administrator, is not a debt to the defendant, her husband, but belongs to him and her in her right. It cannot become his, but by reducing it into possession. Regarding this interest as a debt, there is, then, an inconsistency in attaching it as a debt to the husband; since, which outstanding, it cannot legally be his. He might, indeed, release the demand, or assign it in Equity; but unless he collects the money or disposes of the interest, the right of the wife continues and would survive to her or her representative. He could not recover it in his own name; and it follows, that it cannot be attached as a debt to him. Process operates only upon such interests of the debtor as exist at the time it is served, and not on such as may afterwards arise. *Gentry* v. *Wagstaff*, 3 Dev. 270. *Flynn* v. *Williams*, 1 Ired. 509.

PER CURIAM. Judgment affirmed.

WARREN HARPER *vs* JAMES M. DAVIS.

Where more damages are recovered than are demanded, the plaintiff will be permitted to remit the excess, and have judgment for the proper sum, on paying the costs of this Court.

The case of *Williamson* v. *Canady*, 3 Ired. 349, cited and approved.

Appeal from the Superior Court of Law of Duplin County, at the Spring Term, 1848, his Honor Judge Dick presiding.

The case began by warrant before a Justice of the Peace for "the sum of twelve dollars due by assumpsit." Upon non-assumpsit, the verdict was for the plaintiff, and the damages assessed to $12 for principal money, and for interest $1 50; and from a judgment accordingly the defendant appealed.

The defendant excepted to the instructions to the jury; but it is not material to state the point, as his counsel abandoned it here, and moved to reverse the judgment because there was an excess of damages recovered above those demanded. On the part of the plaintiff, there is a motion to remit the excess, and to have judgment for the residue.

Strange, for the plaintiff.
D. Reid, for the defendant.

Ruffin, C. J. The case of *Williamson* v. *Canady*, 3 Ire. 343, is in point for the plaintiff, on the payment of costs in this Court. Besides the reason there given, it is substantially doing only what the Court would be bound to do on the motion of the defendant. For, if damages be improperly assessed, as, for example, in a

popular action, the judgment may be rightly reversed for the penalty, without the damages; and, if rendered for both debt and damages, upon error brought, the judgment is not reversed *in toto* and judgment arrested, for the incongruity between the declaration and the verdict; but it is reversed as to the damages only, with costs in the Court of error, and affirmed for the debt and the costs in the Court below. *Frederick* v. *Lookup*, Bur. Rep. 2018. The reason is, that the higher Court is to give such judgment as, upon the whole record, ought to have been given in order to terminate the litigation according to the right apparent between the parties. That is the jurisdiction of this Court under the Statute; and therefore the judgment of the Superior Court must be reversed as to the sum of $1 50, assessed damages above the sum demanded in the warrant, with costs in this Court, and affirmed for the sum of $12, thus demanded, and all the other costs.

PER CURIAM. Judgment accordingly.

JOHN C. McKENZIE *vs.* ALEXANDER LITTLE.

The only jurisdiction conferred on this Court in cases at common law is appellate, after a judgment in the Superior Court. Where there has been no such judgment, the cause will not be entertained in this Court.

Case transmitted from Anson Superior Court of Law, at the Spring Term, 1839.

This is an action of debt on an award made on the submission of the intestate Jennings, to which the defendant

pleaded the general issue. He afterwards pleaded a special plea, since the last continuance, to which the plaintiff demurred. Without any trial of the issue or any judgment on the demurrer, the parties agreed to send the case to this Court for decision on the demurrer, and on certain agreed facts.

No counsel for the plaintiff.

Winston, for the defendant.

RUFFIN, C. J. The only jurisdiction conferred on this Court, in cases at common law, is appellate, after a judgment in the Superior Court. The present cause, therefore, cannot be entertained; but the parties must proceed in the case remaining in the Superior Court. Each party will pay his own costs in this Court.

PER CURIAM. Judgment accordingly.

CHARLES DUFFY *vs.* ELIJAH MURRILL, Jr.

Our Act of Assembly in relation to Replevin, Rev. Stat. ch. 101, does not repeal nor supersede the common law remedy of replevin.

At the common law, an action of replevin, could only be maintained in cases of actual taking. Under our Statute, taking is not necessary to entitle the party injured to his remedy.

Appeal from the Superior Court of Law of Onslow County, at the Spring Term, 1848, his Honor Judge DICK presiding.

This is an action of replevin brought to recover a slave. The plaintiff, in taking out his writ, did not make any

affidavit, as required by the Act of 1836. *Rev. Stat. Ch.* 101, *Sec.* 1. For this cause, on the motion of the defendant, the presiding Judge ordered the cause to be dismissed, and the plaintiff appealed.

No counsel for the plaintiff.

W. A. Wright, for the defendant.

NASH, J. The error, into which his Honor was betrayed, consisted in considering the proceedings as instituted under the Act of 1836, when, in truth, it is a proceeding at common law, in which no affidavit is required. The Act does not repeal the common law action, nor supersede it, but simply applies the remedy by replevin to cases, to which it did not before extend. By the common law, a *taking* by the defendant was necessary to authorise this remedy, and such is the language of the writ; it is, "we command you, that justly and without delay, you cause to be replevied the cattle of B. which D. took and unjustly detains," &c. *1st Fitz. N. B.* 68. Without a trespass by the defendant, the writ could not be used. If the defendant came into possession by bailment, the plaintiff was driven either to his action of trover or detinue. By the latter alone, the *possession* of the property detained could be regained, and, even then, after much delay, and subjecting the plaintiff often to inconvenience and loss, which the tardy recovery would not compensate. Much the most valuable portion of the personal property, owned by individuals of this State, consists of slaves, who, by artful and designing men having or pretending a claim of right, can be induced to leave the possession of the proprietor and go into that of his opponent. To such a case the common law remedy by replevin could not apply, because the defendant had not *taken* the slave; he did but detain him. It was the intention of the Legislature to remedy this evil by giving this writ, whereby the

plaintiff might more speedily and surely regain the possession of his property. The words of the Act are very broad, "replevin for slaves shall be held and deemed sustainable in all cases, &c, where actions of detinue and trover are now proper." It is unnecessary to inquire here, whether these words, broad as they are, can embrace every case, in which actions of detinue or trover for a slave may be sustained. It is sufficient for our present purpose, to show that the Act of 1830 was intended, not to repeal the common law remedy of replevin in such cases, but to apply it, when, by the common law, it could not be used. The writ, in this case, is not issued under the Act; if it had been, the affidavit, required in the proviso to the first section, would have been necessary, and his Honor would have been right in holding, that the plaintiff's proceedings could not be sustained; but it is at common. The writ is "then and there to answer the said Charles Duffy, of the taking and detaining," &c. This is the language of the writ, as set forth in the *Natura Brevium*. A taking is charged, and without proving it on the trial, the plaintiff cannot entitle himself to a verdict, if the defendant pleads *non cepit*. *Cummins* v. *McGill*, 2 Mur. 357.

Per Curiam. Judgment reversed and a *venire de novo* awarded.

ARCHIBALD MUNROE *vs.* JACOB STUTTS, ADM'R, &c.

Where the declarations of one, alleged to be an agent, are offered to be given in evidence, it is incumbent on the Judge to determine, at least so far as to say, whether there is such *prima facie* evidence of agency, as to render the acts and declarations of the proposed witness those of the plaintiff.

It is the province of the Court to pass on every question of the admissibility of evidence.

Merely serving a warrant for debt, issued by a justice, is no evidence that the officer was the agent of the plaintiff in the warrant.

Where there are more pleas than one, and the jury find on them all, and error is alleged in the charge of the Court only as to one, this Court must affirm the judgment below.

The cases of *Williams* v. *Williamson*, 6 Ire. 281, *Bullock* vs. *Bullock*, 3 Dev 260, and *Morrisey* v. *Bunting*, 1 Dev. 3, cited and approved.

Appeal from Moore Superior Court of Law, at the Special Term, in the Spring of 1848, his Honor Judge SETTLE presiding.

In April, 1838, a warrant was brought in the name of Archibald Munroe, guardian of the infant children, &c., and to the use of Cornelius Dowd, trustee, &c., against William Barrett and others, for $49 and interest, due by note. It was executed by one Hedgepeth, a deputy sheriff, and, on the 5th of May following, judgment was rendered against Barrett, and staid on the 14th of the same month. The present suit was commenced on the 15th of December, 1843, by warrant on the above mentioned judgment. The pleas were *nil debet*, payment, *plene administravit*. Upon the trial in the Superior Court, a witness for the defendant deposed, that he was a constable in 1838 in Moore County, (where the parties lived,) and that in the latter part of the year, one Sowell delivered to him some papers against Barrett, which Sowell said he got from Hedgepeth, who was then sick: that

he, the witness, took a negro on the papers and committed him to jail, and either returned the papers to Hedgepeth or left them with the jailor. He could not now say, that the judgment now sued on was one of the papers: and it did not appear that any execution had ever issued on it, nor that Hedgepeth ever had the judgment in his possession. The witness further stated, that in a short time afterwards, Barrett had the negro again in possession; and that early in 1839, Hedgepeth, after selling a wagon belonging to Barrett, said that he had collected a great deal of money from Barrett, and had received all the debts he had against him, and that soon afterwards Hedgepeth left this State. The counsel for the plaintiff objected to the declarations of Hedgepeth, because he was not the plaintiff's agent, and had no authority to receive this money. Upon cross-examination, the witness said, that he had no knowledge that Hedgepeth ever had the original judgment, or had any thing to do with the matter further than to serve the warrant, as appeared from his return on it. The Court admitted the evidence; and then instructed the jury, that if they were satisfied, that Hedgepeth had received the debt under an execution, or as the agent of the plaintiff, they should find for the defendant. The Court then submitted the question of agency to the jury with directions, that Hedgepeth's endorsement on the warrant was not, of itself, sufficient to establish his agency; but that if they found it from all circumstances, their verdict should be for the defendant; if otherwise, then they should disregard his declaration, and find for the plaintiff.

The jury found on all the issues for the defendant, and the plaintiff appealed from the judgment.

Kelly, for the plaintiff.
Mendenhall and *Iredell*, for the defendant.

RUFFIN, C. J. The evidence set forth in the exception, and the questions made upon it, related altogether to the plea of payment, and it is to be regretted, that the form of the verdict does not allow a decision to be made exclusively on those questions, as the Court is of opinion, that the decision in the Superior Court was erroneous. Upon the objection to the competency of Hedgepeth's declarations, it was incumbent on the Judge to determine; at least, so far as to say, whether there was such *prima facie* evidence of agency as to render the acts and declarations of Hedgepeth those of the plaintiff. 1 *Phil. Ev.* 103. *Roberts* v. *Gresley*, 3 *Carr* v. *Payne* 380. It is the province of the Court to pass on every question of the admissibility of evidence. But supposing the submitting the question to the jury to imply a decision, that there was such *prima facie* evidence of agency, then that decision seems to us to be erroneous also. There is no evidence of an authority in Hedgepeth to receive the money. He served the warrant; and that is all. It does not appear, that he ever had in his hands the bond on which the warrant was brought, nor that he held the judgment, when rendered; and it is expressly stated, that no execution was issued on it. The case on this point is exactly that of *Williams and High* v. *Williamson*, 6 Ire. 281. Indeed, the jury were told, that the service of the warrant was not sufficient to establish the agency. Yet, it was left to them to find it upon "all the circumstances," when there was no other circumstance relevant to the point. The witness spoke of "some papers" delivered to him by one Sowell, which, he said, he got from Hedgepeth. But Sowell's declaration was not competent to establish that fact, and, besides, the witness could not say that those papers had any thing to do with this claim. There was, then, no evidence that Hedgepeth collected this debt, nor that he was authorised to collect; and the judgment would be reversed if that were the whole case.

But the jury found all the issues for the defendant, as well those on *nil debet* and *plene administravit*, as on the plea of payment. Whatever error may have occurred in respect to the last issue, was harmless. The other two pleas constitute independent bars; and no error is suggested in them. Therefore, according to the cases of *Bullock* v. *Bullock*, 3 Dev. 260, and *Morrisey* v. *Bunting*, 1 Dev. 3, the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

ABNER COLTRAINE *vs.* JOSEPH SPURGIN, ADM'R, &c.

A. brought a suit on a note, in which B. was the principal, and C. surety. B. was dead and the suit was against his administrator and C. At the return term A. entered a *nolle prosequi* against the administrator of B. and took judgment against C. alone. C. having paid the debt, brought suit against the administrator of B., who in the meantime had disbursed all the assets in the payment of other debts of equal dignity with that of A. *Held*, that the administrator of B. had committed no *devastavit* as regarded C., that C. as a surety, had no further rights than A. had possessed, and A. having relinquished his lien upon the assets of B. by discontinuing his suit against his administrator, the right of the surety, as the substitute of his principal, to obtain priority, could only accrue from the commencement of his action against the administrator of B.

Appeal from the Superior Court of Law of Randolph County, at the Fall Term, 1848, his Honor Judge CALDWELL presiding.

The following case agreed was submitted to the Court.

Jesse Harper held a note on defendant's intestate as principal, and plaintiff as security, on which suit was

brought against defendant and plaintiff; and the writ, executed on both, returned to Randolph County Court, at May Term, 1843. The defendant, on return of said writ, had assets sufficient to pay said debt, but craved nine months before pleading. Whereupon the said Harper discontinued as to the defendant, and at August Term, 1843, took judgment on said bond, which judgment plaintiff paid on the 7th day of February, 1844, then amounting to $601; to recover which, this suit is brought.

Between the May Term 1843, of said County Court, and the bringing this suit, defendant paid out all the assets in satisfaction of bonds of his intestate, on which writs were issued after May Term, 1843, and recovery had, before this suit was instituted.

If on the foregoing statement of facts, the Court should be of the opinion with the plaintiff, he is to have judgment for $601, with interest from the 7th February, 1844. Otherwise judgment for defendant that he has fully administered.

It is considered by the Court, upon the case agreed, that the amount of the plaintiff's debt is $601, with interest from 7th February, 1844; that the defendant hath fully administered the assets of his intestate, and that he recover his costs against the plaintiff, to be taxed by the Clerk.

It is further considered by the Court, that the plaintiff recover his debt and costs of suit, out of the real estate of the defendant's intestate, in the hands of his heirs at law; from which judgment the plaintiff prayed and obtained an appeal to the Supreme Court.

Morehead, for the plaintiff.
Iredell, for the defendant.

Nash, J. This is an action of debt.

The only question presented by the case, is as to the manner, in which the defendant has disposed of the assets

of his intestate. It is admitted that they have been exhausted in the payment of the just claims of creditors. The plaintiff contends, that in administering them, the defendant has been guilty of a *devastavit* and must answer his claim *de bonis propriis*. The situation of an executor is one full of peril, and it often requires great caution to discharge correctly his trust. The law, whether wisely or not, is not now to be enquired of, has made a discrimination between the debts of a deceased person, as to the order in which they shall be paid; and, if in discharging them, this order is knowingly violated by the executor, it subjects him to the liability of paying, out of his own property, the creditor, who has been injured. Among debts, however, of equal dignity, it is his privilege to pay which he choses, and, if there be not assets sufficient to pay all, he does no legal injury to any one. The privilege is taken from him, by the bringing of an action at law, or the commencing of a suit in equity, by the equal creditor. His hands are then tied, as to a voluntary payment, without suit. In this State, all bonds, bills, and promissory notes, and liquidated accounts, settled and signed, stand in the same rank, and have precedence, in the course of administration, over open accounts, and verbal promises, or liabilities created by operation of law. If we understand the ground, upon which the plaintiff attempts to charge the defendant with a *devastavit*, it is, that the bringing of the suit by Mr. Harper, so fixed the assets in the hands of the defendant, that he could not pay a debt of equal dignity, without a violation of his duty. So far as Mr. Harper was interested, the position is correct, but unfortunately for the argument, Mr. Harper has no longer any interest in this matter. At the return term of his writ, he entered a *nol. pros.* as to the defendant, cut himself loose from him and abandoned, so far as his prior claim extended upon the assets of Hoover, all claim upon the defendant. Im-

mediately upon this discharge, the administrator was at liberty to pay any debt due from the estate, of equal dignity, and this privilege continued until suit was brought against him, upon some claim of the same or some higher class. By the common law, a surety, who pays the specialty debt of his principal, whether with or without suit, has a claim against his principal for so much money paid to his use. 2 *Wil on Ex'rs*, 669. The law is altered with us as to the administration of assets. *Rev. Stat.* 113, *Sec.* 4. In such case, the Statute declares, "the claim of the surety against the executor or administrator of his principal, shall have the same priority against the assets, as belonged to the demand of the creditor." The most this action has done, is to transfer to the surety, against the executor or administrator, the right of him, whose claim he has discharged. Beyond this, it does not go, nor did it intend to go, and before the privilege conferred by it can be claimed, the debt must be discharged by the surety. This was not done by the plaintiff, until after all the assets had been administered in the payment of bond creditors. His right was not, and could not be greater than Harper's. And by the *nol. pros.* the latter had abandoned his lien, and stood upon an equality, and only with an equality with other bond creditors, as if he had not brought that action. Until he commenced upon his bond another suit, the right of the administrator to prefer another creditor, equal in degree, was not disturbed. 1 *Saun.* 332, *a. n.* 8. In the case before us, the judgment against the plaintiff was obtained at August Term, 1843, of Randolph County Court. After that term it was discharged by him on the 7th of February, 1844. He commenced this action the 10th of February, 1844, after the exhaustion of the assets in the payment of debts of equal dignity.

The defendant, in paying those debts, violated no duty, and was guilty of no *devastavit*.

His Honor, after giving judgment in favor of the defendant, upon his plea of fully administered, went further, and gave judgment, that the plaintiff recover his debt and costs of suit, out of the real estate of the defendant's intestate, in the hands of his heirs at law; from which judgment, plaintiff appealed. We are, therefore, to consider that the latter judgment was not asked for by the plaintiff; the case does not so state, and we cannot suppose, in the absence of all evidence in the case, to the contrary, that he appealed from his own judgment.

This was an error on the part of the presiding Judge, for which the judgment must be reversed and the case remanded, that the plaintiff may take a judgment *quando*, or against the land at his option, or neither.

Ruffin, C. J. The question upon the case agreed depends simply upon the operation of the Act of 1829, on the plea of *plene administravit*. It enacts that the claim of a surety, who pays the debt, shall have the same priority against the assets in the hands of the principal's executor, as belonged to the demand of the creditor, which was thus discharged. *Rev. Stat. Ch.* 113, *Sec.* 4. The whole effect of that is to keep up the dignity of the debt, though paid, for the benefit of the surety, as it was in the hands of the original creditor. *Chaffin* v. *Hanes*, 4 Dev. 103. This debt was due by note, and it never attained a higher dignity against the principal or his administrator. Until the administrator was sued, he could apply the assets to any other note or bond. After the suit brought and discontinued, he had the like liberty; for, the case was then the same as if no suit had been brought. When sued on other specialties, the administrator could not defend the actions by pleading the former suit on this note, for it no longer bound the assets, and the pleas in the subsequent suits must state the assets truly at the time of the pleas. Clearly then, as the admin-

istrator could not resist the recoveries of the other bond creditors, he would not have been liable to Harper for the assets applied to their discharge, had he brought a second suit on the note after those recoveries. The same rule is applied by the Statute to the debt in the hands of the surety, for whose benefit the dignity of the debt, acquired in the hands of the creditor, is retained, but is raised no higher. Upon these grounds I concur with my brother NASH, that the defendant was entitled, upon the case agreed, to judgment on his plea of fully administered.

For the reasons given by him, I am also of opinion, it was erroneous, without a prayer to that effect, to give judgment in such a form as to compel the plaintiff to go against the lands descended; and that, to that extent, the judgment must be reversed, so as to let in the plaintiff to take that judgment or one *quando*, at his election. And to enable him to proceed on either of those judgments the more conveniently, the case must be remitted to the Superior Court, so that the judgment may be entered there, in order that the *scieri facias* on it may issue from that Court, instead of this.

PEARSON, J. I concur in this opinion.

PER CURIAM. Remitted to the Court below.

THE PRESIDENT AND DIRECTORS OF THE LITERARY FUND *vs.* MAJOR JOHN CLARK.

Where a grant begins on a lake, and thence runs a certain course and distance, then again a certain course and distance, then a third line a certain course and distance, thence "with the windings of the Lake-water to the beginning," *Held*, that although the distance mentioned in the third line should fail before the Lake was reached, yet it must be continued to strike the Lake, and then the boundary be along the Lake.

If the course of the third line would not go to the Lake, then from the termination of the distance on that line, a direct course must be taken to the Lake.

A plat, annexed to a grant, cannot control the calls of the grant, where it does not lay down a natural boundary therein called for.

The cases of *Sandifer* v. *Ferebee*, 1 Hay. 237, *McPhaul* v. *Gilchrist*, 7 Ire. 179, *Henly* v. *Morgan*, 4 Dev. & Bat. 425, and *Haughton* v. *Rascoe*, 3 Hawks 21, cited and approved.

Appeal from the Superior Court of Law of Hyde County, at the Spring Term, 1848, his Honor Judge DICK presiding.

This was an action of ejectment, in which the plaintiffs claim under the Acts of Assembly granting the vacant swamp lands in the State to the Literary Board, and the defendant under a grant to one Solomon Smith, issued in the year 1786.

The question in this case is upon the construction of the grant to Smith, which is mentioned in the pleadings. The description is this: "Lying on Pungo Lake, and beginning on the Lake side, at a place known by the name of the Old Landing, and thence South 80 poles; thence West 400 poles; thence North 80 poles; thence East 400 poles, with the windings of the Lake-water to the beginning, as by the plat hereto annexed doth appear." The plat referred to is a parallelogram formed

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by lines from the cardinal points, 80 poles by 400, and does not lay down any part of Pungo Lake. The Court below non-suited the plaintiffs and they appealed.

B. F. Moore, for the plaintiffs.
J. H. Bryan and *Shaw*, for the defendant.

Ruffin, C. J. The decision depends on the length and course of the third line, "North 80 poles." It must be extended, beyond the distance called for, to the lake in some direction; because the next line from its termination is described, as not only being "East 400 poles," but, furthermore, as running "thence with the windings of the Lake-water to the beginning" on the Lake. For it has been decided in a great number of cases, so as to be settled in this State, that the mathematical calls in a deed must give way to those for visible objects capable of being identified; as, for example, marked trees, and, with yet more reason, natural boundaries, as they are called, such as rivers, or other streams, mountains, rocks, or other enduring monuments. Indeed the rule has been found to have been laid down in the Statute book itself, as early as 1715, in the provisions for resurveying prior patents; which direct that "the surveyor shall proceed by marked trees, if the same can be found, or by natural boundaries, if any mentioned; and if there be not marked trees, then he shall follow the courses mentioned in the patent, so as the intention of the party first taking up the land may be observed as near as may be." *Ire. Rev.* 1715, *Ch.* 29. The reason thus given makes it plain, that the rule rests upon a presumption, that there is less probability of a mistake having been committed in a line identified by marked trees or by a stream, than in one to be ascertained by the chain and compass merely; and therefore, that, by having regard to those natural objects, the intention of the party will more probably be fulfilled than by respecting

the courses and distances only. Then, if the third line here, instead of being described as "North 80 poles," had gone on further "to the Lake," there could be no scruple in extending the line to the lake, though it be three or four times the distance. But in truth the calls, taken together, amount substantially to that supposed; for, although the third line is, in itself, described by course and distance only, yet the line from its termination goes "*thence with the windings of the lake to the beginning*," which necessarily carries the third line itself to the lake. Indeed the case is precisely the same as *Haughton and Slade* v. *Rascoe and Gray*, 3 Hawk. 21; in which one of the points was on this description: "then North 12 degrees, East 530 poles, then along the thoroughfare to the first station;" and it was held that the line, North 12 degrees, East 530 poles, went to the thoroughfare, and the next with the thoroughfare to the beginning.

It was, however, argued at the bar, that the plaintiffs were entitled to judgment upon the case agreed, because, at all events, the patent did not cover all the land claimed by the defendant, inasmuch as the line was to go from the point, at which the distance gave out, the nearest way to the lake; which is at a point considerably East of that where the third line intersects the lake, when extended due North. But the position is not correct in this case. It would be true, if the third line, pursuing its course, would not touch the lake at all; for, in that case, after completing the distance called for on the third line, the lake, on which the land must be bounded, could only be reached by changing the course, and, then, the most direct course must be adopted, forasmuch as there can be no other certain one. But neither course nor distance can be parted from further than the one or the other is necessarily controlled by other calls. In all other respects they stand, as if they were the sole terms of description. Here the error in the distance—80 poles—is

the only one which is apparent, and that is corrected by carrying the line to the lake. But as the line, when protracted North, actually intersects the lake, that course must be pursued, because there is nothing to turn the line in any other direction.

However the plat, annexed to a grant, may, in some cases, aid in the interpretation of ambiguous calls, it cannot have any effect in this case, since it does not purport to lay down the lake at all, although the accompanying description calls for it twice, and the Act of 1777 expressly requires water courses crossed or touched, and other remarkable places to be set down. The omission renders it highly probable, that the plat was made without actual survey, and thus deprives it of whatever credit it might otherwise be entitled to. But, at all events, there is nothing on it which can prevent the lines, which call for the lake, from going to or with it.

PEARSON, J. I concur in this opinion.

NASH, J. The question raised in this case was decided in the year 1795, in that of *Sandifer* v. *Ferebee*, 1 Hay. 237. The call of the third line, in that case, was "thence South to a White Oak, *then along the river to the beginning*." The white oak stood a half a mile from the river, yet the Court decided, that the river was the boundary. In a very recent case the same point was decided, and that of Sandifer referred to and approved. *McPhaul & Gilchrist*, 7 Ire. 169. There the calls of the grant were—beginning at a red oak on Drowning creek, thence South three degrees West 179 poles to a pine, thence North eighty-seven degrees West 179 poles to a hickory, *thence the courses of the Swamp to the beginning*. The distance, called for in the third line, gave out before reaching the swamp, nor could any hickory be found, either at the termination of the distance or at the swamp. Then the de-

cision was, that the *swamp* was the boundary, and constituted the back line to the beginning; and that the third line was to be extended to it. In each of these cases, the Court rested their decisions upon the calls of the grant. It was apparent, in the first case, that the river was intended to be the terminus, and the swamp in the latter. Those cases differ from the present only in the fact, that the grants in the former called for trees as corners, here there is nothing but course and distance. The calls of the Solomon Smith grant, under which the defendant claims, are as follows: lying on the East side of Pungo River and on Pungo Lake, beginning on the lake side, and running thence South 80 poles, then West 400 poles, then North 8 poles, thence East 400 poles, *with the windings of the Lake-water* to the beginning. If the third line stops, when the distance gives out, and you then run directly to the beginning, due East, it is manifest, the land will not touch the lake, except at the beginning point, and two important descriptions of the grant are described, to-wit, "lying on Pungo Lake" and "the windings of the lake-water." The grant has assigned to the third line three descriptions, the course, distance, and the lake. The latter, if called for, controls both the former—this is admitted. It is as much called for in the Smith grant, as it was in the grants in either of the cases cited, and those cases establish the law to be, that, in such a description, the natural object is sufficiently called for, to designate it as the boundary intended. Adopt the plaintiffs' construction, and the rule is reversed; the artificial boundaries overrule and control the natural—the strong yields to the weak, the permanent to the transient. The plaintiffs' claim to the land, in question, rests on the Act creating a fund for the establishment of common schools, and an Act to drain the swamp lands of the State, and create a fund for common schools—the first part in 1825, the second in 1836. *Rev. Stat. Chs.* 66, 67. It is con-

tended, that the third line of the Smith grant must stop at the end of the distance and that the home line must run directly West from that point to the beginning, and the plat, annexed to the grant, is adduced as proof, that it was so actually run. The plat is no part of the grant, and cannot control its calls, nor is there any evidence of an actual survey, according to course and distance, but if there was, it could not control the call for the natural boundary. *Hurly* v. *Morgan*, 4 Dev. & Bat. 425, and many other cases. We see no error in the judgment of the Court below.

PER CURIAM. Judgment affirmed.

JOSEPH B. G. ROULHAC *vs.* JOHN WHITE & AL.*

The declarations of a slave, at any particular time, as to the state of his health, are, from necessity, admissible in evidence.

Whenever the bodily or mental feelings of an individual, at a particular time, are material to be proved, the expression of such feelings, made at or soon before that time, is evidence, of course subject to be weighed by the jury. The case of *Clancy* v. *Overman*, 1 Dev. & Bat. 402, cited and approved.

Appeal from the Superior Court of Law, of Bertie County, at the Spring Term, 1848, his Honor Judge SETTLE presiding.

The action is in case, for fraud in the sale of a slave, named Jack. The plaintiff purchased the slave from the defendants, in January, 1842, and he died in the following Fall, of consumption. To show that Jack was unsound at the time of the sale, the plaintiff produced a Doctor Barron, who stated that he saw Jack in the Fall of

*NOTE.—The *Chief Justice*, being related to one of the parties, gave no opinion in this case.

1841, that his appearance, then, indicated to him, that his health was bad. In answer to his enquiries, Jack said, he then had a sharp pain in his breast, and from the sickly appearance of his skin, and his hurried respiration, the witness had no doubt he was then laboring under the incipient stages of consumption. Dr. Armstead and Mr. Capeheart also saw the negro in the Fall or Winter of 1841, while in the possession of White, one of the defendants, before the plaintiff bought him, and testified to the declarations of Jack, as to his *then* situation. The defendants objected to the admissions of the declarations of Jack at the time they were offered; the Court overruled the objection. The jury found a verdict for the plaintiff, and the defendants moved for a new trial, because the Court had admitted the declarations of Jack, and the Court overruled the motion, and the defendants appealed.

Heath, for the plaintiff, submitted the following argument:

The only question is, whether the declarations of the slave were admissible as to his *then* state of health; that such declarations are admissible, see *Aveson* v. *Lord Kinnaird*, 6 East. 188. 1*st Greenleaf on Evidence, title Hearsay*, pages 178, 179. The slave is stated by the physicians to have been sick, and whenever "*the bodily* or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are original evidence." "So also the representations by a sick person, of the nature, symptoms, and effect, of the malady, under which he is laboring, *at the, time* are received as original evidence," and the fact that these representations were made "to a medical attendant" even, does not exclude them. *Greenleaf ut Supra.*

That the declarations were made by a slave does not render them inadmissible; that such declarations of a

slave are receivable, is sanctioned by this Court in *Clancy* v. *Overman*, 1 Dev. & Bat. 402.

No counsel for the defendants.

NASH, J. There can be no doubt that his Honor was correct in admitting, as evidence, the declarations of the slave as to the state of his health, at the time they were made. The question was as to the health of Jack before and at the time of the sale. And whenever the bodily or mental feelings of an individual, at a particular time, are material to be proved, the expression of such feelings, made at or soon before that time, is evidence. Whether they were real or feigned, is for the jury to decide. 1*st Greenleaf's evidence*, 178. Upon this principle it is that the declarations of a wife, made immediately after receiving an injury, are receivable as evidence in an action by her and her husband—not to show who did the injury, but as to its extent. *Thompson and wife* v. *Trevanion. Skin. Rep.* 402. Inquiries by medical men and the answers to them, are evidence to show the state of health of the individual—it is admissible from the very nature of the thing. *Aveson* v. *Lord Kennaird*,, 6 East. 188. So in an action for an assault and battery, what the plaintiff has said to his surgeon, of what he has suffered from the assault, is competent evidence. 1 *Phil.* 232. Such declarations made by a white man, then, are clearly admissible in evidence. Is the principle varied, when proceeding from a slave? From the nature of the evidence, we think not. It is admitted from necessity, and as being in the nature of *pars res gestæ*. In *Clancy and Overman*, 1 Dev. & Bat. 402, the declarations of a slave were admitted in evidence. He had been bound apprentice to the defendant, to learn the trade of a carriage maker, and the action was brought to recover damages, for not teaching him the trade; the defence was, that the boy would not learn, and his declarations to that effect were ad-

mitted; and the Court say, they are admitted, because they are evidence of his disposition and temper, which are the subjects of the investigation, and these cannot be ascertained except in that way. The case of *Gray* v. *Young*, 4 McCord, 38, is a direct authority. That was an action for breach of a warranty of the soundness of a slave. His declarations, that he had a pain in his side, by which the disease was detected, were held to be admissible. So in *Turner* v. *Knox*, 7 Munroe, the same doctrine is held. The Act of Assembly, upon the subject of persons of color being witnesses against white persons, does not apply.

We see, therefore, no error in the opinion, complained of, and the judgment is affirmed.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF THOMAS MORISEY *vs.* THOMAS HILL.

The lien of a *fieri facias* upon the equitable interest of a debtor commences only from the time of its issuing, and not from its *teste*.

The cases of *Henderson* v. *Hoke*, 1 Dev. & Bat. Eq. 119, and *Hall* v. *Harris* 3 Ire. Eq. 289, cited and approved.

Appeal from the Superior Court of Law of Duplin County, at the Spring Term, 1848, his Honor Judge DICK presiding.

The lessor of the plaintiff claimed the premises as a purchaser of them as the lands of Harold Blackmore, under a judgment rendered against him and a *fieri facias*

bearing teste the 4th Monday of September, 1843. The execution was levied on the 20th of October, and the land was sold in March 1844, when the lessor of the plaintiff purchased and took the sheriff's deed and then brought this action. The plaintiff further gave evidence, that Sarah A. Pasteur was seised in fee of the premises, and by her agent, Alexander Stanford, contracted to sell them in fee to Blackmore on the 27th of April, 1841; for the performance of which, Stanford executed his covenant to Blackmore, and that Blackmore immediately entered into possession, and afterwards paid the purchase money. The plaintiff further proved, that in October, 1843, Blackmore contracted with Hill for the sale of the premises to him in discharge of a debt which he owed Hill, and assigned to Hill Stanford's covenant, but dated the assignment as of the 1st of July, 1843, in order that it might appear to have been made before the judgment recovered against Blackmore; and that thereupon Blackmore went out and Hill went into possession of the premises.

Upon the foregoing case the defendant's counsel prayed the Court to instruct the jury, that the plaintiff had no title and could not recover. But the court refused so to do; and instructed the jury, if they found that Hill went into possession under Blackmore, that then the plaintiff was entitled to recover. For, that it would only be necessary for the plaintiff to show the judgment and execution, sheriff's sale and conveyance to the lessor of the plaintiff, to enable him to recover against Blackmore, were he in possession; and that the same was sufficient to entitle him to recover from any person who went into pessession under Blackmore. The jury found for the plaintiff, and the defendant appealed from the judgment.

W. Winslow, for the plaintiff.
W. H. Haywood, and *W. A. Wright* for the defendant.

RUFFIN, C. J. The instruction would have been correct, if Blackmore had been in possession at the time of the sale and the defendant had afterwards entered under him; for the privy in estate is bound by the estoppels, which affect the person under whom he derives the estate. So, too, it would be, if Hill went in after the day to which the execution related; for a sale does not affect the lien of the execution, and the purchaser holds subject to it as his vendor did. But this case is not of either of those kinds. Blackmore was out, and Hill in possession at the time of sale. Then, as to the relation of the execution, the case is, that it bore teste as of September Term of the Court, but the plaintiff did not shew the day it was sued out, but only that it was levied on the 20th of October, and that the defendant purchased in October, but whether before or after the 20th of October, the plaintiff did not establish. That being so, it was erroneous to hold, that the plaintiff was entitled absolutely to recover. For Blackmore's interest in the premises, being a trust, though liable to be sold under execution, *Henderson* v. *Hoke*, 1 Dev. & Bat. Eq. 119, was not, like a legal estate, bound from the teste of the execution, but only from the time of execution served, under the Act of 1812. *Hall* v. *Harris*, 3 Ire. Eq. 289. It was incumbent on the plaintiff, relying on the lien of the *fieri facias*, to show, that it overreached the day of the defendant's purchase—that is, supposing that purchase not to be fraudulent, as was assumed to be the fact in the instructions. For, no doubt the defendant is at liberty to insist, that the debtor's interest was not liable to the lien of the execution at the time of his purchase. For example, that he purchased the legal estate before the teste of the execution, or before the delivery of a justice's execution; and so, in like manner, that the debtor had sold and transferred the trust before execution sued, and that the trustee was no longer seised in trust for him, but for his assignee. This

was laid down in *Hall* v. *Harris*. But, in truth, the plaintiff here relieved the defendant from proving the nature of Blackmore's interest by giving the proof himself. The case was, therefore, but the common one, in which both parties claim under the same person, and, for that reason, neither can deny the title of that person, and the question is simply, which of them derived the better title from their common vendor.

The defendant's purchase, certainly, operates only from the day it was in fact made. If it shall turn out, that the execution had then been issued, there is an end of the question, and the plaintiff must recover by force, simply, of its lien. But if the purchase was prior, the plaintiff can only recover by shewing, that it was not for the payment of a just debt or other valuable consideration, or otherwise not *bona fide*, but fraudulent.

PER CURIAM. Judgment reversed and *venire de novo*.

WILLIAM R. POOLE, CHAIRMAN, &c. *vs.* ANDREW COX & AL.

When a term of office (as that of sheriff) is for more than one year, the bonds given for the faithful discharge of the duties of his office, at the time of the appointment, and the new bonds given from that time to time afterwards, are cumulative; that is, the first bonds continue to be a security for the discharge of the duties during the whole term, and the new bonds become an additional security for the discharge of such of the duties as have not been performed at the time they are given.

The cases of *Bell* v. *Jasper*, 2 Ire. Eq. 597, and *Oats* v. *Bryan*, 3 Dev. 451, cited and approved.

Appeal from the Superior Court of Law of Wake County, at the Fall Term, 1848, his Honor Judge DICK presiding.

This was a case agreed, and the following are the facts. James Edwards was elected sheriff of the County of Wake, for two years, commencing at August Sessions, 1846, when he gave a bond in the penal sum of five thousand dollars, for the collection and payment of the County, Parish, and School Taxes. At August Sessions, 1847, he executed a bond, for the same purposes, in the penal sum of five thousand dollars in conformity with the law requiring a renewal of his official bonds, and died about the 20th of September following, without having made any settlement for the said taxes or any portion of them.

The sheriff, at his death, had collected, on account of said funds, the amount of seven thousand seven hundred and seventy dollars and eighty cents, ($7770 86-100) of which the sum of ten hundred and ninety-five dollars and eighteen cents, ($1095 18-100) was on account of the common school fund, and the residue for County and Parish taxes. On the 28th day of January, 1848, the plaintiff, William R. Poole, as Chairman of the Board of superintendants of common schools, having demanded the money, due that fund, of the defendants as sureties on the official bond of August 1847, and they refusing to pay the same, instituted this suit, by giving notice to them of an intended motion for judgment against them, at February Sessions, 1848, for the said sum of money; which was done; a motion made, judgment of the County Court rendered therefor, and an appeal taken to the Superior Court, where the cause pended until this term.

After the institution of this suit, an action was commenced in the County Court of Wake on the bond of August, 1846, at the instance of the Trustees of the said three funds, and judgment confessed on the said suit for the entire penalty of the bond, to-wit, five thousand dollars, ($5000.) At this term of the Court, the defendants pleaded, since the last continuance of the cause, the said

judgment of the County Court, in bar of the plaintiff's recovery.

If, upon the foregoing case, the plaintiff, in the opinion of the Court, shall be entitled to recover, it is agreed, that he shall have judgment for the said sum of ten hundred and ninety five-dollars and eighteen cents, with interest from the 1st day of October, 1847; and if the opinion of the Court shall be with the defendants, then judgment of non-suit shall be entered.

And the Court being of opinion that the plaintiff is entitled to judgment, it is considered that the plaintiff recover against the defendants, the said sum of ten hundred and ninety-five dollars and eighteen cents, with interest from 1st day of October, 1847, and costs of suit. Appeal to the Supreme Court by the defendants prayed and granted, and without security, by consent.

N. B. The judgment was rendered *pro forma*, by consent of parties.

B. F. Moore, for the plaintiff.

G. W. Haywood, *McRae* and *Iredell*, for the defendants.

Pearson, J. We consider the principle well settled, that where a term of office is for more than one year, the bonds given, for a proper discharge of the duties of the office, at the time of appointment, and the new bonds given from time to time afterwards, are cumulative—that is, the first bonds continue to be a security for the discharge of the duties, as at first intended, and the new bonds become an additional security for the discharge of such of the duties, as have not been performed at the time they are entered into.

This principle is deduced from two considerations. The new bonds are not required for the relief of the sureties upon the first bonds, but are taken for the benefit of those,

who may be concerned in the proper discharge of the duties of the office; and when the office is to continue for more than one year, it was presumed that the bonds, taken at first, might become insufficient from the insolvency of the sureties or other causes; hence the Legislature took the precaution to require new bonds to be given from time to time, and the Courts, in order to give effect to the intention of the law-makers, consider the new bonds not as taking the place of the old ones, but as additional thereto.

Bell v. *Jasper*, 2 Ire. Eq., and other cases settle this principle as to the bonds of guardians. *Oats* v. *Bryan*, 3 Dev. 451, settles this principle as to the bonds of Clerks. The same principle is applicable to the bonds of Sheriffs. We presume, the question would not have been raised, but for the fact, that formerly sheriffs were appointed annually, and then their bonds were not cumulative, for each appointment was a new office, and the sureties of one year were no more bound for the duties of a former year, when the same man was appointed a second time, than if another person had received the appointment; but when the law was changed, so that the sheriffs are elected for two years, and are required to renew their bonds annually, then the principle of cumulative bonds clearly applied. When there is the same reason, there is the same law.

The counsel for the defendants attempted to take a distinction, between bonds, like the present, given at the expiration of the first year, for the collection of County, poor, and school taxes, and the then bonds of a sheriff; insisting that bonds, like the present, are prospective—that this bond, given in August 1847, was a security for the taxes collected in 1848, and the bond, given in August 1846, a security for the taxes collected in 1847.

We are unable to see any ground for this distinction. The principle, which has been established, is, that the

new bonds are additional securities for the discharge of all such duties as have not been performed at the time they are entered into, as well such as have been commenced, but are not completed, being "in *fieri*," as those which have not been entered upon. In this case the duty of collecting, receiving and accounting for the taxes collectable in 1847, had been commenced, but was not completed, and it falls within the words of the bond, and within the principle above announced.

The defence of a former judgment is wholly untenable. The parties, in this action, are not the same—the bond is not the same; and, by the case agreed, the damages, to be recovered in this action, are not the same with those, recovered in the other action, being merely the excess above what is covered by the former judgment, so that even if that judgment had been *satisfied*, there would be no bar.

PER CURIAM. Judgment affirmed.

CATHARINE G. MEARES *vs.* THE COMMISSIONERS OF THE TOWN OF WILMINGTON.

A municipal corporation, which has authority to grade the streets, is liable to any damages which may accrue to an individual from having the work done in an unskilful and incautious manner.

An action in *tort* will lie against a corporation.

Appeal from the Superior Court of Law of New-Hanover County, at a Special Term in January, 1847, his Honor Judge MANLY presiding.

This was an action on the case, to recover damages of the defendants for causing one of the streets in the town

of Wilmington to be cut down to the depth of four or five feet, by which the earth of a certain lot, lying on the said street, was caused to fall, bearing with it sundry brick walls on the said lot, and rendering it necessary to the plaintiff to be at great expense in reconstructing said walls, and either to grade down the said lot to its former relative level with the street, or construct additional walls and steps, to render it as valuable to the plaintiff as before the digging.

The proof was, that the lot in question was a dwelling house lot, which had been occupied for the purpose of a dwelling house lot, with a house upon it, between twenty and thirty years, by the plaintiff and those under whom she claimed: That a fire occured, by which the said dwelling house, in common with many others in the town of Wilmington, was consumed, leaving a part of the walls of the house, which had been built for more than twenty years, still standing, and also a brick wall or fence which had been built some seven or eight years; and that, by the digging, which had been done under the direction of the defendants, the earth of the lot, which was a body of deep sand, had given away, and the walls of both kinds above mentioned had fallen, and that it had become necessary, to enable the plaintiff to use the said lot as before, to rebuild said walls, and also to grade down the said lot, or to build other walls to sustain the embankment, and put steps thereto; and that, to make the repairs and additions thus rendered necessary, the plaintiff had been compelled to lay out between fifteen hundred and two thousand dollars.

The defendants shewed, that they, being Commissioners of the town of Wilmington, deemed it expedient to grade Chesnut and Front streets, shortly after the fire above mentioned, as they contended they were empowered to do by sundry Acts of Assembly, passed in relation to the town of Wilmington; and had passed an order according-

ly to grade Front street; and that, in pursuance of said authority and order, persons under their direction had proceeded to cut down Front and Chesnut streets, at the south eastern intersection of which streets the plaintiff's lot stood, as described above. And they contended—1st. That the plaintiff was not entitled to recover against them, thus acting under public authority, whether due caution was used or not.

Secondly. That due caution had been used, and the injury to the plaintiff, if any, had been the consequence of washing rains and not the natural result of the defendants' acts.

Thirdly. That the plaintiff, had, in fact, been benefited and not injured by the grading of the streets, in doing which the digging complained of by the plaintiff had been necessary.

Fourthly. They insisted that the plaintiff was only entitled to damages for the destruction of such superstructures as had been standing twenty years, if to any damages at all.

The plaintiff insisted that the acts of the defendants were altogether unlawful, and that no proper authority had, at any rate, been given to grade Chesnut street; and if lawful, it had been done in so unskilful or incautious a manner as to produce the injury complained of, and that she had sustained loss thereby to the amount stated above or more.

His Honor charged the jury, that the acts of the defendants were lawful, provided they were done with ordinary skill and caution, and it was for the jury to say, whether such ordinary skill and caution had been used; if they had not and injury resulted to the plaintiff for want of such ordinary skill and caution, she was entitled to recover, provided, further, that her injury had been the direct consequence of such want of skill or caution; for, if the fall of her lot or walls had been the consequence of

high winds or washing rains as had been urged at the bar, and not the mere natural results of the defendants' want of skill or caution, plaintiff would not be entitled to damages. But that, if in the main, they should find for the plaintiff, they ought to consider further, whether, upon the whole, the plaintiff's lot had been increased in value by the defendants' acts to the full amount of her injury, and, if so, she would not be entitled to damages; and if the injury, if any, was greater than the increased value given to the lot by the defendants, then they should deduct such increased value from the amount of injury, and give to the plaintiff a verdict for such difference.

A verdict having been rendered for the plaintiff for five hundred dollars damages, and a rule for a new trial having been discharged, the defendants appealed.

Strange, *W. H. Haywood*, *Meares* and *Iredell*, for the plaintiff.

Badger and *W. A. Wright*, for the defendants.

Pearson, J. We think the charge of his Honor was fully as favorable to the defendants, as they had a right to ask. The whole of it is in their favor, except the instruction: "That if, in doing the work, ordinary skill and caution had not been used, and the plaintiff was damaged thereby, she was entitled to recover."

It is true, his Honor did not instruct the jury, what would amount to ordinary skill and caution; but no such instruction was asked for; and the defendants have no right now to except, because it was not given.

Our consideration is, therefore, confined to the single instruction above stated.

His Honor instructed the jury, that the acts of the defendants were lawful, provided they were done with ordinary skill and caution. He assumed that the defendants, as commissioners, were vested, by the several acts

of the Legislature upon the subject, with full power to cause the grading to be done, and to levy a tax upon the citizens of the town to defray the expense; and he put the plaintiff's right to recover, upon the question, whether ordinary skill and caution had been used.

If the defendants had caused the grading to be done with ordinary skill and caution, and, by the erection of a substantial wall as the excavation proceeded, had so managed, as to prevent any caving in of the plaintiff's lot, so that the damage, if any, would have resulted, not from a want of ordinary skill and caution, but merely from the fact, that, by reason of the grading, the lot was left higher above the level of the street, and, so, was more difficult of access, and, therefore, less valuable, the case would have presented a very grave question; and we are strongly inclined to think with his Honor, that the plaintiff would have been without remedy; for, as it was lawful for the defendants to do the work, *if it was done in a proper manner*, although the plaintiff was damaged thereby, it would be "*damnum absque injuria*," and give no cause of action. To subject the defendants to an action for exercising in a proper manner power vested in them, by the sovereign authority, for the convenience of the public, would seem to involve an absurdity; hence if the property of one is made less valuable by being left too high, and that of another is made less valuable by being left too low, the parties must submit to the loss for the convenience of the public; unless the law, authorising the act to be done, contains some provision for making compensation, as, in justice, it should do, whenever the work, although done in a skilful and proper manner, will be productive of special damage to an individual; but there can be no provision made for damage, which is the result of a want of ordinary skill and caution in doing the work, as it cannot be anticipated. And this furnishes a strong argument for giving an action to recover damage,

which is the result of a want of ordinary skill and caution; although no action will lie, when the work is properly done; and the individual must submit to the damage, unless his case is specially provided for. It is apprehended, that there was error in not adverting to this distinction in the decision of some of the cases which were relied upon in the argument, and to which attention will be called in the course of this opinion; for which reason it has been dwelt upon somewhat at length.

The jury has found, that the defendants did not use ordinary skill and caution in doing the work, and, as the plaintiff has been compelled to erect the walls, which proper skill and caution made it the duty of the defendants to have erected, in order to protect the lot from the effect of their act, it seems clear that she is entitled to recover. Suppose the case of two individuals: if one digs a ditch or cellar upon his own land, so as to cause the land of another to cave in, or walls of houses to fall, he violates the maxim, "one must use his own so as not to do damage to another," and is as clearly liable to an action, as one who erects a dam upon his own land and thereby ponds the water back upon that of another. The defendants insist, that, if the plaintiff had a cause of action, it is against them as individuals, and not in their corporate capacity, for, as they contend, a corporation cannot be sued in "tort."

It is true, that it was formerly so held, and the reason given in the books is, that the usual process in an action of *tort*, to-wit, the *capias ad respondendum*, could not be served upon a corporation. The law, however, has been settled to the contrary, and the idea, that corporations are less accessible, and less responsible to actions than individuals, (which, by the bye, was one reason why corporations have always been looked upon by the public with so much jealousy and so little favor,) has yielded to common sense, and has been held, ever since the case of *Yar*

borough v. *The Bank of England*, 10 East. 6, when the matter underwent a full discription, and all the objections to the action were satisfactorily disposed of, that corporations were as liable as individuals to be sued in contract or in tort, or to be indicted.

In the United States, the liability of corporations to actions of tort is well settled; indeed the charters of all corporations in this State, provide for the manner and name in which they shall sue and be sued, and no distinction is made between actions in contract and in tort.

We think the plaintiff had her election to sue the corporation, who did the work, or to sue the defendants as a corporation, in which capacity they procured the work to be done, and are liable for the damage done by their agent, under the rule *respondeat superior*. A superior is not liable for the wilful act of his agent, but is liable for the damage resulting from a want of skill and due caution in doing the work.

If the work be done according to the directions of the superior, and the agent is sued and pays damage, he has his redress against the superior; if the work is done contrary to the directions of the superior, and the superior is sued and pays damage, he has his redress against the agent.

It is not necessary to decide whether the action could have been maintained against the defendants as individuals. Certainly it is better for the defendants to be sued as a corporation; for the question, how far they have a right to pay the damage out of the funds of the corporation, will be presented in a more favorable point of view, than if they had been sued as individuals.

The defendants further insist, that, admitting that the plaintiff could maintain an action for the damage supposed, against a private corporation, as a rail road or canal company, yet no action will lie against them, they being a municipal or public corporation, for an exercise

of the power vested in them by the sovereign authority, for the convenience of the public; and contend for this distinction, because, in the former case, the act is done for the benefit of the private corporation, to enable it to make money for the individuals composing the corporation; while in the latter the act is done for the benefit of the public at large. This distinction is taken in several cases cited in the argument for the defendants, and appears at the first suggestion to be plausible, but will not bear examination, and is more fanciful than real.

The inducement on the part of the sovereign to grant the power, is, in both cases the benefit which the public will derive. The inducement on the part of the grantees, to solicit and accept the grant of the power, is, in *both cases*, the benefit which the grantees will derive.

When the sovereign grants power to a private corporation, to construct a rail road, the grant is made for the public benefit, and is accepted because of the benefit which the corporation expects to derive by making money. So when the sovereign grants power to a municipal corporation to grade the streets, the grant is made for the public benefit, and is accepted because of the benefit which the corporation expects to derive, not by making money directly, but by making it more convenient for the individuals composing the corporation or town, to pass and repass in the transaction of business, and to benefit them by holding out greater inducements for others to frequent the town and thereby add to its business. The only distinction then, is, that in the one case money is received directly; in the other, indirectly; but in both cases the individuals, composing, the stockholders, and the citizens of the town, derive special benefit from the work, which is not shared in by the citizens of the State, and, for this reason, the corporation, in both cases, is at the *expense of making the work*, and this is the surest test, by

which to find out for whose special benefit the work is done.

The proposition contended for, on the part of the defendants, is, that a public or municipal corporation is not liable to an action, for doing a work, which the law authorises to be done, and that individuals, sustaining loss thereby, have no redress, unless the law provides for compensation. This proposition is admitted, with the qualification, *provided the work is done in a proper manner*, and the only question is, is the proposition to be *thus qualified?* It has been already suggested, as a reason for requiring the qualification, that compensation can be provided for loss, necessarily resulting from the work, as taking land for the location of a road or other loss which will result, if the work be done in the most proper and skilful manner, whereas compensation cannot be provided for loss resulting from a want of skill and caution, for a want of skill and caution cannot be anticipated, at all events, the degree in which it will be wanting, cannot be known; it was also suggested, as a reason for requiring the qualification, that the distinction attempted to be drawn between a private and a public corporation, by which the one may be made liable in such case and the other not, was not tenable. It is now added, and seems to be conclusive in favor of the qualification, that the grant to do the work necessarily implies a condition, that the *work is to be done in a skilful and proper manner*, so that if the work be not done with ordinary skill and caution, the corporation has not acted in pursuance of the power vested in it; its act is not lawful, but is wrongful, and the damage sustained by an individual is "*damnum et injuria*," for which an action will lie. By way of illustration, power is given to a corporation to grade a street, by making an embankment across a valley, through which a small branch runs; is it not implied that the work is to be done in a skilful and proper manner by making

a culvert, through which the branch can discharge itself? or is the power unconditional, to make the embankment in any way that the corporation may see proper, to fill up the bed of the branch, make no culvert, and leave the water to pond back upon the lots above, unless the owners choose to be at the expense of making a culvert, even if it be lawful for them to do so, by interfering with a work which the sovereign has made it lawful for a municipal corporation to erect?

The bare statement of such a case is a sufficient argument for requiring the qualification, and yet it is, in effect, the case we have under consideration, and we would without hesitation, decide in favor of the qualification upon the reason of the thing, unless the authorities have settled the law to the contrary too clearly to allow of such a decision.

The authority, mainly relied on as being directly in point, is a decision in the State of New York. *Wilson* v. *the Mayor, &c., of the City of New York*, 1 Denio, 595. It is admitted that this case, if correctly decided, is in point, but with proper respect we conceive that the decision was erroneous, and that it is not supported by the case of the *Governor, &c., of Cast Plate Manufacturers* v. *Meredith*, 4 Term Rep. 796, upon which the Court base their opinion. The error, it seems to us, is in holding that the power to do an act is unconditional; whereas we think there is always a condition implied, that the work shall be done properly. The case was: the plaintiff owned a lot at the intersection of 40th street and the 7th avenue; the defendants having power to raise and grade the street and avenue, raised them eighteen inches, *without making any drain or sewer*, whereby the water from the street and avenue, and the adjacent lots, flowed upon the plaintiff's lot and there remained in a pond, and could not flow off, because of the obstruction presented by the street and avenue so raised, and for the want of a

drain or sewer. The plaintiff in his declaration alleged, that the work was done carelessly, and proved the facts, as above stated. The Court was of opinion that the action could not be sustained and the plaintiff was non-suited, assuming the broad ground, that the corporation was not liable for damage done to individuals, in the exercise of its power to raise and grade the streets, and without leaving the fact to be decided by the jury, whether the work had been done "carelessly," and with a want of ordinary skill and caution, of which we think there was full proof.

The case of the *Governor, &c.* v. *Meredith*, 4 Term Rep 796, upon which the above case is made to rest, was this: The plaintiff owned a lot on High Ground street, upon which he had three ware-houses, with an arch and gate-way under one of them, leading from the street under and through into his yard behind, and used it for loaded wagons to pass from the street into the yard, for which purpose it was of sufficient height. The defendants, who acted under the authority of the commissioners of the town, who were authorised to raise and grade the streets by an act of Parliament, and who had previously taken a level and decided upon the height to which it was necessary to raise the street opposite the ware-house and gate-way of the plaintiff, in strict pursuance of their directions, raised the street 2 feet and 1 inch; whereby the gate-way of the plaintiff was made so low above the street, that loaded wagons could not enter as before, and it became necessary to unload the wagons in the street and carry the articles through to the back yard. The arch could not be made higher without injury to the house. The special case, made after a verdict for the plaintiff, stated, as facts agreed, the facts above and also this further fact: That the height to which the street was raised opposite plaintiff's gate, was necessary to make a regular inclined plane with a fall of one foot in

seventeen, and "the work could not be *effected* if done in *any other way*. The line, so made, was necessary and proper, and any alteration of the inclined surface of the street *less material*, was not sufficient to render the *street safe* for carriages."

Lord KENYON held, that neither the defendant nor the commissioners were liable for doing the work, although the plaintiff was thereby damaged, and put his decision upon this ground: "It does not seem to me, that the commissioners acting under this act, have been guilty of any *excess of jurisdiction*."

BULLER, Judge, put his decision upon the ground, that the act gave a particular remedy, by making provision for compensation, but inclined to concur with the Chief Justice, that the plaintiff would have been without remedy, if no provision for compensation had been made; concluding "that if the thing complained of was lawful, no action can be sustained against the party doing the act. In this case, express power was given to the commissioners to raise the pavement, and, not having exceeded their power, they are not liable to an action for having done it."

GROVE, Judge, put his decision upon the provision for compensation, and expressed no opinion on the general question.

So that in this case the work was properly done, and no want of ordinary skill and caution was alleged. And the case of *Wilson* v. *the Mayor, &c. of New York City*, is placed in this predicament. If the work was properly done, then it is sustained by the above case, upon which it professes to be grounded; but is not in point as an authority in the case now under consideration, where a want of ordinary skill and caution is expressly found by the jury. But if the work was *not* properly done, then, although in point, yet it is not sustained by the case above stated.

The case of *Bailey* v. *the Mayor, &c. of the City of New York*, decided in the Supreme Court of that State, and reported 3 Hill 531, and again decided in "The Court for the correction of errors," reported 2 Denio, 433, was also cited, not as a case in point, for the decision was against the corporation, but as recognising the exception, contended for, in favor of Municipal Corporations, by putting the case upon special grounds, which, in the opinion of the Court, made it an exception to the general rule.

The case was, that the plaintiff owned land, mills, &c., on Croton river, below the point where the defendants had caused a dam to be erected to turn the water out of the river, for the purpose of taking it to the City, in pursuance of powers vested in them by the Act of the Legislature: A freshet in the river carried away the dam and caused great damage to the plaintiff, by washing away his land, mills, &c. The plaintiff, in the Court below, offered to prove that the dam was negligently, unskilfully, &c. constructed, by reason of which the dam was swept away, &c. The Judge below rejected the evidence and directed a non-suit. Upon an appeal to the Supreme Court, a new trial was granted; the Court being of opinion that, although as a general rule, a municipal corporation is not liable to the action of an individual for acts done under a power vested in it by law, yet this case formed an exception, for although the public might derive a common benefit from the erection of the work, still the grant of the power was made for the private advantage and emolument of the corporation, inasmuch as the water was to be sold; and so the corporation was liable as an individual or a private corporation would be. Upon the second trial, the same facts being proved, the jury found for the plaintiff and assessed damage to $62,888 73. The case was then taken to the Court for the correction of errors, where the decision of

the Supreme Court was affirmed, and the Court, admitting as a general rule that a municipal corporation is not liable to the action of an individual for acts done under a power vested in it by law, was of opinion that this case formed an exception; not upon the ground taken in the Supreme Court, for making it an exception, but upon a distinct and different ground: that the corporation owned the land, upon which the dam was erected, and was, therefore, liable for its improper construction. In both Courts, it was taken for granted, that the work was not properly done, and instead of coming to the same conclusion upon grounds so distinct and different, the two Courts might safely have adopted the common ground, that an Act, which gives power to a corporation to do a certain work, implies that the work is to be done properly; and hence, a corporation, whether private or municipal, whether the act is done with a view to the receipt of money directly, or only for indirect or collateral advantages, and whether the land belongs to the corporation, or is only to be used and kept up as streets, in any and all of these cases, is liable for any damage resulting from a want of ordinary skill and caution in doing the work; although it is not liable, when the work is properly done and in strict pursuance of the power vested in it, for any damage, which necessarily results from the work, and does not depend upon the *manner* in which it is done. In such cases, individuals must submit to the loss, "*salus populi suprema est lex*;" which maxim, softened down, means that the interest of individuals must give way to the accomodation of the public. But as the maxim is somewhat harsh in its mildest sense, we are not disposed to extend its application, especially when no provision is made for compensation.

Per Curiam: Judgment affirmed.

DEN OF DEMISE OF ABNER SCOTT & AL. *vs.* JOHN B. SEARS.

One of several lessors in an action of ejectment has a right to have his name erased from the declaration.

He is liable to his co-lessors for his proportion of the costs, but if judgment be ultimately rendered in favor of the plaintiff he is entitled to be re-imbursed for such proportion out of the costs recovered from the defendant.

Appeal from the Superior Court of Law of Wake County, at the Fall Term, 1848, his Honor Judge DICK presiding.

The declaration of ejectment, in this case, was returnable to August Term, 1845, of Wake County Court, and contained but one demise and that in the name of Scott and wife. At that term the defendant appeared, and entered into the common rule and pleaded not guilty. Upon motion of the plaintiffs by their attorney, they were permitted to amend their declaration by adding a count in the name of Ann Jones; and the counsel, on the demand of the defendant, produced a power of attorney from Ann Jones, authorising him to use her name for that purpose. Whereupon, the defendant's counsel produced to the Court a power of attorney subsequent in date to that shown by the plaintiffs, authorising and empowering him to strike out her name from the declaration. Upon the motion of the defendant's counsel the demise in the name of Ann Jones was stricken from the declaration. Whereupon the plaintiffs moved that she pay the costs, which was refused; and the plaintiffs appealed to the Supreme Court.

G. W. Haywood, *McRae* and *Miller*, for the plaintiffs.
W. H. Haywood, for the defendant.

NASH J. The case is before us upon the interlocutory order, authorising Ann Jones to have the demise in her name erased from the declaration. If it was a matter of discretion in the Court, we have no authority to interfere with its exercise; our only business, on appeals, is with the legal errors committed or alleged to be committed. We, however, consider it a matter of right on the part of Mrs. Jones. If she had been the only lessor of the plaintiff, it cannot be questioned, she would have had the right to dismiss the action. We cannot perceive in what manner that right was taken from her, so far as the demise in her name was concerned, by its being joined in the declaration with one from Scott and wife. The demises are separate and distinct, and in no way dependent on each other. The motion here was similar in its character, to entering a *nolle prosequi*. Where a plaintiff perceives he cannot support his declaration in whole or in part he may enter a *nol. pros*, either to the whole or part of his cause of action. *Tidd's Pr.* 681. *1st Ch. on Pl.* 609. *2nd Sellon's Pr* 458. *Fray* v. *Fray*, 2 *Bl. R.* 815. In this case Mrs. Jones did not, by withdrawing from the declaration the demise in her name, interfere with the action, as to any right the other lessors of the plaintiff had to prosecute it. We think there was no error in permitting the demise in the name of Mrs. Jones to be stricken from the declaration.

But we think the Court ought to have made an order on this party for the payment of her share of the costs, incurred on the part of the plaintiffs. She gave an express consent to a count in her name, and, although she cannot be prevented from discontinuing the action so far as it is hers, she is obliged, in common honesty, to pay the other lessors of the plaintiffs or their common attorney her aliquot part of all the costs. *Jackson* v. *Stiles*, 5th Cowen 419. For this reason the judgment must be reversed, with directions to the Superior Court, to correct

the order appealed from, in the matter here pointed out. If the plaintiff should ultimately succeed, she will be entitled to receive back the costs, so paid by her, out of those collected from the defendant.

PER CURIAM. Ordered accordingly.

JAMES CARROLL, ADM'R *vs.* EDWARD E. HUSSEY.

Where an execution issues against A. and is levied *bona fide* on property in the possession of B., on the allegation that the property is really in A., the action of replevin will not lie against the sheriff.

The case of *McLeod* v. *Oats*, 8 Ire. 387, cited and approved.

Appeal from the Superior Court of Law of Duplin County, at the Fall Term, 1848, his Honor Judge SETTLE presiding.

This is replevin for a slave, which the defendant avowed taking as sheriff of Duplin under a *fieri facias* from the County Court, against the property of Edward A. Houston. At the time of the seisure the slave was in the possession of the plaintiff; and the only question at the trial was, whether the action would lie. A verdict was taken for the defendant, subject to the opinion of the Court on that point; and the Court afterwards gave judgment on the verdict and the plaintiff appealed.

D. Reid and *W. A. Wright*, for the plaintiff.
W. Winslow, for the defendant.

RUFFIN, C. J. In *McLeod* v. *Oats*, 8 Ire. 387, the case did not require the Court to go further than to say, that replevin would not lie against an officer for goods seised in the possession of the defendant in execution; and the decision was confined to that point. But the reasoning, on which the opinion was adopted, embraces the present case also, in which the actual possession was not in the debtor. The rule, which is laid down by writers of high character, that goods taken in execution are not repleviable; the want of precedents of such actions in the old books, and the very grave inconveniences which would arise from extending the action to property in *custodia legis*; all concur in producing the conviction, that it will not lie in any case. It was argued for the plaintiff, that, if the goods seised be not the debtor's property, the process is no justification, but the officer is a trespasser *ab initio*; and therefore that replevin as well as trespass ought to lie for such a wrongful taking. In the first place, that is a misapplication of the doctrine alluded to; for it properly belongs to a case of abuse of process, which authorises the officer to do a particular act and in doing it he transcends his authority, and therefore no part of his act is justifiable. But execution against the goods of one person is no authority whatever for taking the goods of another; and therefore the sheriff in such a case is an actual trespasser from the beginning, and not merely by relation from subsequent *mal-feasances*. Besides, the argument is completely a *petitio principii*; for it assumes that the goods belong to the plaintiff in replevin, whereas the controversy in such a case always must be, whose property they are; and therefore the enquiry arises, whether this action, when brought against the officer, is a proper, convenient, and legal mode of trying that question.

That the statute does not help the plaintiff was shown in the case before cited. But it seems, on the contrary,

to furnish an additional argument against any straining in favor of the action, which would create such impediments to the execution of process; because, by the statute, the owner of the slave may bring replevin against the purchaser from the sheriff, which amply secures to him the slave specifically.

PER CURIAM. Judgment affirmed.

EX PARTE MAKEPEACE & AL.

Spinning machinery, used in a factory, constitutes a part of the improvements of real estate required to be assessed for taxation under our revenue laws.

Appeal from the Superior Court of Law of Montgomery County, at Spring Term, 1848, his Honor Judge BAILEY presiding.

This was an application to reduce the valuation of a piece of land, assessed for taxation in Montgomery County, for the year 1847. The case appears to be this: Samuel H. Christian was seised in fee of a tract of land on the Pee Dee river, and in the year 1845, entered into a contract of copartnership with George Makepeace to erect and work thereon a mill or factory for spinning cotton, to be driven by the water or river, on the following terms: Christian was to erect a suitable house, and attach to it the machinery necessary to work the mill, such as a large water wheel, and other wheels, &c.; and Makepeace was to furnish the spinning machinery, and fix it in the house so as to answer the purpose. The copartnership was to continue ten years under the firm of

"The Swift Island Manufacturing Company." A certain sum was to be paid annually by the firm to Christian for the use of the ground and house, and, then, the profits be divided between them; and at the end of the term, Makepeace was to remove the machinery furnished by him. In 1846, the house was built and the large wheels, and the spinning machinery fixed in it, and the Factory put into operation; and it so continued until the period for taking the tax list for 1847. The land was then given in by the firm, stating the Factory to be an improvement thereon; and the Board of Valuation valued the land with improvements thereon at $6000, including therein the value of the machinery for spinning, as well as the values of the land itself and of the mill house and of the other wheels and machinery, besides that more particularly called the spinning machinery.

Upon the return of the list to the next County Court, Makepeace and Christian moved the Court to reduce the valuation, upon the ground, that the spinning machinery was not a part of the improvements on the land, and that, therefore, too high a valuation had been put on the premises. On hearing the motion, it was established, that the spinning machinery itself was affixed to the floors of the building by iron bolts and screws, and that by removing the screws and bolts, the machinery could be detached from the house and taken away without injury to the said machinery or the house. The Court refused to reduce the valuation.

Makepeace and Christian then took up the case by *certiorari* to the Superior Court; and it was there held, that the machinery for spinning was not subject to taxation; and the order of the County Court was quashed and a *procedendo* awarded to that Court to reduce the valuation of the land and improvements, by deducting therefrom the value of that part of the machinery. From the

decision an appeal was allowed to the Solicitor on behalf of the State and County.

Winston, for Makepeace.
Iredell, for the County.

RUFFIN, C. J. The question is, whether the machinery for the spinning of the cotton, separate from the wheels which set it in motion, is no part of the "improvement" on the land, and, so, exempt from taxation; or whether the house, the main water wheel and other wheels, and the spinning machinery, constituting together the Factory, be not, as a whole, such an improvement on the land as to be liable to assessment, within the meaning of the revenue laws. The opinion of the Court is, that it is thus liable.

Formerly land was not taxed *ad valorem* in this State, with the exception of town lots. But since 1814, the land tax has been laid according "to its value, including improvements thereon." *Rev. Code, Ch.* 872. The term "improvements" had been before applied to town lots as subject to taxation according to their value. *Ired. Rev.* * * 1784, *Ch.* 1; and it must have meant the buildings on them. Under various Acts since 1814, the owners of land gave in their lists, describing the situation and number of tracts and the quantity, and affixing also the value of the land and the improvements. But in 1836, it was enacted, that the value should not be given in by the owner; but that a board of valuation, constituted of a justice of the peace and two freeholders, should upon oath ascertain the cash value thereof and return it to the County Court, subject to correction there, at the instance of persons aggrieved by too high a valuation. By the first section of the Act, the tax is laid on the land with improvements thereon. Probably different views were taken on the point, what constituted "improvements" in

different parts of the State, to the prejudice of the revenue, so as to give occasion for the Act to provide for the re-assessment of land in 1846, ch. 75. That enacts that the board of valuation for 1847, should ascertain on their own view or the oath of witnesses, as accurately as practicable, the cash value of land with improvements, and that they should annex to their return an affidavit, that the valuations of the land with improvements thereon are, in their judgment and belief, the actual value thereof in cash. Although the Legislature has in no one of the Acts defined what are the improvements on land, which are to be taken into consideration in setting a value upon it, either by the owner or the board of valuation, yet it seems manifest that the term was used in all the Acts with the intent to embrace all such buildings and erections as add to the value of the estate and would pass as a part of it under a sale and conveyance. Hence dwelling houses, barns, granaries, stables and other farm buildings, houses of business and trades, such as shops, ware houses, tanneries, vats, mills and the like, must certainly come within the description of improvements on land. With respect to mills, the Court is quite clear in holding, that whatever is parcel of one of any kind, whether a saw or grist mill, a carding, spinning, or weaving mill, forms a part of that improvement on the land, and for the time being is to be taken into the estimate of its value for the purposes of taxation. The rules respecting the right to fixtures of the character of this machinery, as between landlord and tenant, or between the owners of a particular estate and the remainder men, can have, it is conceived, but little application to the point in this case. Our enquiry is, how are these fixtures to be regarded, as to their nature, when the premises and fixtures are in the possession and enjoyment of the legal owner of the land itself. If Mr. Christian were the sole and absolute owner of the Factory and occupied it, then, undoubtedly, every part of

the machinery, whether that more especially called the spinning machinery, or the large water wheel or other wheels by which the works are moved, would form a part of the realty. Trespass *quare clausum fregit* would lie for an injury to any part of it, and no one would think of bringing trespass *de bonis asportatis* in such a case. A constable could not enter the mill with a *fi. fa.* and detach the frames and other parts of the spinning apparatus from the house by taking out the bolts and screws which confine them, and sell them as personal chattels. This machinery seems for many purposes of the same character with the skreens, bolting chests, mill-stones, and the other apparatus in the grist mill; and precisely of that character for the purposes of this case. It forms parcel of the cotton mill or factory as the others do of the grain mills, and, without some reservation, would pass by a conveyance of the mill; and, consequently, ought to form parts of the mill for taxation. It is of no consequence, that the contract between the parties authorises one of them at a future period to sever the machinery from the house and carry it away. When thus severed, or, perhaps, when the time of severance shall have come, it may be regarded as exclusively the property of him who has the right to remove it, and consequently would then be reckoned personalty. But at present the land, with the house on it and the machinery attached to it, is occupied by these two persons as the temporary owners of the whole, who are to give in the land with the improvements for taxation; and while they thus occupy it, they ought to give it in precisely as the sole owner in fee would.

The Court is, therefore, of opinion, that the order of the Superior Court was erroneous and must be reversed; and that the original order of the County Court should stand: which must be certified to the Superior Court, to the end that a writ of *procedendo* may thence issue to

the County Court, where the tax books remain, in order that those books may be duly and finally settled in this respect.

PER CURIAM. Ordered accordingly.

JOHN PATTERSON *vs.* WILLIAM BODENHAMER & AL.

A. by a verbal contract, agrees to convey a tract of land to B. upon condition that B. would erect a house upon it. Before this was done C. levies an execution he had against B. upon his interest in the land. A. then conveys the land to D. and with a view of overreaching C.'s execution antedates the deed. *Held*, that the mere antedating the deed did not make it fraudulent and void. *Held*, secondly, that B., having only a parol contract for the sale of the land, had no equitable claim against A. which was liable to execution under our Act of Assembly subjecting equitable interests in land to sale by execution.

The cases of *Henderson* v. *Hoke*, 1 Dev. & Bat. Eq. 138, and of *Thorpe* v. *Hicks*, 1 Dev. & Bat. Eq. 617, cited and approved.

Appeal from the Superior Court of Law of Guilford County, at the Fall Term, 1848, his Honor Judge CALDWELL presiding.

The action is in trespass, to recover damages for injury to land. The circumstances of the case are as follows. In 1843, a man by the name of Lamb agreed, verbally, to convey the land in question, of which he was the owner, to William Patterson, upon condition that he would put a house upon it and finish it. Before that was done, McConnell and Lindsay obtained a judgment against Wm. Patterson, and in the month of July, 1843, caused the execution which had issued on the judgment, to be levied on the land. An order of sale was ob-

tained at August term, 1843, and under the *venditioni exponas*, it was sold in November, and the defendant, Bodenhamer, became the purchaser. In order to defeat the levy, Lamb, by the directions of Wm. Patterson, conveyed the land in August, 1843, to John Patterson, the plaintiff, who was the father of William, but dated it so as to overreach the levy. The trespass consisted in removing the house from the land.

The presiding Judge charged the jury, that if the deed to John Patterson was antedated for the purpose of overreaching the levy of the execution, it would be a fraud on the part of the plaintiff, and such an one as would vitiate and defeat his right to recover.

Under the charge of the Court, the jury found for the defendant and the plaintiff appealed.

J. T. Morehead, for the plaintiff.
Iredell, for the defendant.

NASH, J. We think his Honor erred. We do not believe the antedating the deed, as stated in this case, did have the effect of making it void. The date of the deed is not an essential part of it. It is customary to insert one in every deed, as one and the most certain mode of showing when it took effect—and *prima facie*, it is evidence of the time of delivery—but, like all such evidence, may be contradicted. But a deed is good without any date, or with an impossible one, for it takes effect from the delivery, and only from that time. The date, inserted, is, however, so far a part of the deed, that if, after its delivery, it be altered by any person claiming an interest under it, without the knowledge of the grantor, or, in case of a bond, of the obligor, it is rendered utterly void, and this, because it ceases to be the deed of the person executing it. It is considered, by the law, out and out a forgery. In this case, the title of the land, in question, was

in Lamb, and he made the deed to the plaintiff, and, though the object or purpose, for which it was ante-dated, was a dishonest one, still, between them, it was valid and passed the title to the plaintiff, at least so far, as to enable him to maintain an action of trespass against a wrong doer, and such we consider the defendant. He, doubtless, acted under the belief, that his title to the land was good, but it was not so. Wm. Patterson, his debtor, had no such interest in the land as was subject to an execution. So far as the case discloses the facts, he never was in possession. Lamb had verbally promised he would convey the premises to him, upon certain conditions with which he had not complied. But in addition to this, his contract was void, being in parol. *Rev. Stat. Ch.* 50. *Sec.* 8. If it had been in writing, and he had complied with its terms, so far as they were conditions precedent to be performed by him, he could have enforced a conveyance of the legal title from Lamb, and, therefore, would have had such an interest, under the 1st section of the Act of 1812, as would have been liable to the *fi. fa.* That Act is not confined to express trusts, but extends to all cases, in which any person is, in any manner, seised in trust for a defendant in an execution, as in the case of sale by articles in writing, where the vendee has paid the purchase money and done all the acts, to be performed by him. *Henderson* v. *Hoke*, 1 Dev. & Bat. Eq. 138. Several cases in this Court establish the doctrine, that the 1st section of the Act of 1812, extends to no trust, where the *cestui que trust* has not a right to call for an immediate conveyance of the legal estate. *Thorpe* v. *Hicks*, 1 Dev. & Bat. Eq. 617. If the purchase by the defendant conveyed to him the legal title, then he would hold it, under the 1st section of the Act, discharged of any claim by Lamb, for that section acts upon the estate. In whatever way we consider the case, William Patterson had not such interest in the land as could be reached

by an execution at law, and the defendant acquired nothing by his purchase, and in removing the house was a mere wrong doer, and liable to the plaintiff in damages.

Per Curiam. Judgment reversed and a *venire de novo* awarded.

JOEL E. HORNE & AL. *vs.* JAMES HORNE & AL.

If a testator knows what he is doing and to whom he is giving his property, his mental capacity is sufficient to enable him to make a will.

The domicil of origin of a person continues until he acquires another, by actual removing to another country with the intention of remaining in the latter altogether or for an indefinite period.

Two things must concur to constitute a domicil; first, residence, and, secondly, the intention to make it a home.

And if these two concur, it makes no difference how short his residence may be in the new domicil.

The case of *Plummer* v. *Brandon*, 5 Ire. Eq. 190, cited and approved.

Appeal from the Superior Court of Law of Anson County, at the Spring Term, 1848, his Honor Judge Bailey presiding.

This was an issue of *devisavit vel non* upon a paper writing, offered for probate by the plaintiffs, as the last will and testament of Joel Horne, deceased, in which paper writing, the said plaintiffs were named as executors and only legatees. Three objections were raised by the defendants, to-wit:

1st. That the supposed testator was not of sufficient capacity to make a will, for want of a sound disposing mind and memory.

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2ndly. That if not actually incapable of making a will, he was unquestionably a man of very feeble intellect, and executed his paper writing under influence and through fraud and circumvention.

3rdly. That the supposed testator was domiciled in Chesterfield District, South Carolina, and not in Anson County, North Carolina, at the time of executing said paper writing; and that the paper writing was not executed according to the laws of the former State.

Upon the first point, one of the subscribing witnesses testified fully to his belief of the sanity of the supposed testator at the time of signing the said paper writing, and the proof of the *factum* and subscription by two witnesses, according to the laws of North Carolina, was full, although the second subscribing witness said that he had no distinct opinion whether the supposed testator was sane or not—he having but little means of judging, having never seen him until called upon to witness his will, though he discovered nothing to make him doubt his sanity. Other witnesses, on the part of the plaintiffs, testified to their belief of his capacity to make a will, though all concurred in the belief that he was a man of weak understanding. One witness testified that three or four years before, the testator had expressed a purpose to give his property to the plaintiffs, who are, in fact, the only legatees in the will; and several of the witnesses spoke of his intention to give a part of his property to the plaintiff, Joel E. Horne, together with others, and this at different times. On the part of the defendants, four witnesses proved, that he was, in their judgment, incapable of making a will; and of these were his attending physician, and two persons, who had for some time resided in the same house with him. It was in proof, that he had 16 or 17 slaves: That one of them had great influence over him: That he had many relations equally near with the plaintiffs, to several of whom he had ex-

pressed his intention of giving property, as well as to the plaintiff, Joel E. Horne, and to one witness his intention to give his property to other relations, as near as Joel E. without mentioning him at all, and at another time a determination to make no will at all. The supposed testator was a native of Chesterfield District, South Carolina, where he had resided all his life, until a few weeks before his death, upon the part of the same plantation, on which he had been born, and where both his parents had lived and died and were buried: that he lived in a very uncomfortable way among his negroes, without any white family, having never married: that his farm was small and poor, and his slaves were so unproductive as to render it necessary for him to borrow money, which was furnished him to some extent by Joel E. Horne: that when 36 years of age, he fell into a very bad state of bodily health, and was advised by his physician to seek a place where he would be more comfortable: that accordingly, upon the invitation of Mrs. Worley, who lived in North Carolina, near the line, as was the residence of the testator in South Carolina, he went to her house, where he remained a few weeks and became discontented, but while there, proposed to young Mr. Worley, her son, to bring his slaves to Mrs. Worley's, work them upon the farm, and make some division between them of the profits; but young Worley declined the arrangement, saying, that his negroes were unmanageable, and he did not wish to have any thing to do with them. He was then removed to Nancy Horne's in South Carolina, she being the widow of his brother, Thomas Horne, who had several children, and while there was kindly treated, for which he expressed himself grateful, as well as for that at Mrs. Worley's, and to one or two witnesses expressed his intention of rewarding them in his will, although at the time of making his will three or four weeks afterwards, he expressed himself dissatisfied with them, and determined to give

them nothing. Within a few days after his coming to Mrs. Nancy Horne's, he was removed, together with his slaves, by the plaintiff, J. E. Horne, to the plaintiff, Wm. Horne's, in Anson County, North Carolina, early in December. Before leaving South Carolina the last time, he observed to a witness, that his place was too poor for him to live on: that he had rented Wm. Horne's old place in Anson County N. C., where he was going to make a crop, and Joel E. Horne was going to superintend his hands; to another witness he said, he was going to stay awhile, but would return again; to the subscribing witnesses to the will, he said, he was about to rent, or had rented, Wm. Horne's old place, and Joel E. Horne was to superintend his affairs. The witness was not clear whether he said he had rented or was about to rent. On the 14th of December the will was executed, and after that day, no witness deposed to having seen him, though it is believed he died about Christmas following the making of the will, but whether at William Horne's residence, or at the place spoken of, as having been rented by him, did not appear, nor did it appear whether he or any of his slaves had ever been on the William Horne old place. His will was proven in common form at January term, 1841, being the next term of that Court after his death, which occurred on the second Monday of January. There were but two subscribing witnesses to the will, and it was proved that by the law of South Carolina, three were necessary to a will, either of realty or personalty.

His Honor charged the jury, that, if they believed the evidence touching the paper writing, it was duly proved according to the laws of North Carolina, and they should find it to be the last will and testament of the testator, Joel Horne, deceased, unless one of the three objections, raised by the defendants, existed in fact, the first of which was that the supposed testator, Joel Horne, was not of sound and disposing mind and memory.

Upon this point, the Court informed the jury, that it was in evidence that Joel Horne was always a man of weak intellect, and especially during his last illness: That weakness of mind was not itself a valid objection, as the law did not undertake to weigh the size of men's intellects: that it did not require that he should be a wise man: that, if he was between the wise and foolish sort, although he inclined rather to the foolish, he was, in law, capable of making a last will and testament: that to enable a man to make a disposition of his property by last will and testament, he must do it with understanding and reason; and that if the jury should be satisfied that, at the time of executing the paper writing, Joel Horne had not understanding and reason, they should find a verdict against the will: that if the supposed testator knew what he was doing at the time of making the supposed will, and that he was giving his property to the plaintiffs, and that they would be entitled to it, provided the forms of the law were complied with; then they should find in favor of the will. As to the second objection, the Court instructed the jury, that, if they should be satisfied, that the plaintiffs or either of them, or his negro woman Hannah had had such control and dominion over the supposed testator, and had exercised that control and dominion illegally and fradulently, in the disposition which he had made of his property, then the paper writing offered for probate would not be his will, but the will of those exercising such improper influence, and, if they should be satisfied, that that was true, in this case, they should find against the will. But, although the jury should be satisfied that there had been importunity and persuasion on the part of the plaintiffs, or either of them, or the negro woman Hannah, and the supposed testator had yielded to such importunity and persuasion because he was convinced it was right, it would not render the will invalid. But if the importunity was so great that the testator was

too weak to resist its influence, and his free agency was taken away, then they should find against the will.

As to the third objection, the Court instructed the jury, that a man's residence *prima facie* was his domicil, that wherever his residence was, there was his home, his domicil, *prima facie*, but not being conclusive, it was susceptible of explanation; that residence and domicil were not convertible terms: that a man might have his residence at one place, and his domicil at another; and that the domicil of origin continues until it is changed for another, that the testator's domicil of origin was in South Carolina, and it continued still to be in South Carolina, unless it was proved that he had changed it; that if he had left South Carolina for this State for a temporary special purpose, not with a view of making it his home, but of returning to South Carolina, then he had not lost his original domicil, and of course, had not acquired a new one here, and if they should so find, then they should render a verdict against the plaintiffs, because the will had not been proved according to the laws of South Carolina, but if they should be satisfied from the evidence, that the testator had abandoned his home in South Carolina, and come to Anson County in this State, for the purpose of settling there either permanently or for an indefinite time, although he had not consummated that purpose, but was prevented from doing so by death's overtaking him, his domicil would be in this State.

The defendants' counsel then requested the Court to charge the jury, that if the supposed testator was so deficient in memory, as not to remember who his relations were, as appeared must be the case from his speaking but a few days before of giving them his property and now not mentioning them at all, he was incapable of making a will. The Court refused so to charge, but told the jury, that if he understood what he was doing when he made the will, so as to know he was giving his property to the plaintiffs,

he had such a sound and disposing mind as would enable him, in law, to make a will. A verdict having been returned in favor of the plaintiffs, and a rule for a new trial having been discharged, the defendants appealed to the Supreme Court.

Iredell, for the plaintiffs.
Strange, for the defendants.

NASH, J. This was an issue of *devisavit vel non* to try the validity of a paper writing, purporting to be the last will and testament of Joel Horne, deceased.

Three objections were made by the defendants, the caveators. First, that the deceased had not mental capacity. Secondly, if he had, his mind was so weak that he was easily influenced, and executed the paper under influence and through fraud and circumvention: And thirdly, that the supposed testator was, at the time he executed the paper, a citizen of South Carolina, and had his domicil there, and that the paper writing was witnessed by only two subscribing witnesses, whereas by the laws of that State, three were necessary.

The defendants' counsel then requested the Court to charge the jury, that if the supposed testator was so deficient in memory, as not to remember who his relations were, as appeared must be the case, from his speaking but a few days before, of giving them his property, and now not mentioning them at all, he was incapable of making a will. The Court refused so to charge, but told the jury, that if he understood what he was doing when he made the will, so as to know that he was giving his property to the plaintiffs, he had such a sound and disposing mind as would enable him, in law, to make a will.

In his charge, the presiding Judge went fully into the evidence, upon each question raised in the cause, and it

was fairly left to the jury. Upon the questions of law, embraced in the first and second objections, although his Honor might have been more explicit, we think he was sufficiently so, and that the charge, in those particulars, was substantially correct. As to the mental capacity of Joel Horne, his language is, "that if the supposed testator knew what he was doing, at the time of making the said supposed will, and that he was giving his property to the plaintiffs, and that they would be entitled to it, provided the forms of the law were complied with, they should find in favor of the will." We do not see that the defendants have any right to complain of what is here laid down. If the deceased had the portion of mental capacity, here required, he had such a mind and memory, as the law required, to enable him to dispose of his property by will. As to undue influence, or the papers being obtained from the deceased by fraud and imposition, there was no evidence whatever to sustain the objection and his Honor ought so to have informed the jury.

The instruction, asked for by the counsel of the defendants, was not such as the Court could give. It required the Judge to pronounce an opinion upon a matter of fact —to-wit: "that a few days before making his will, the deceased spoke of giving his property to his relations, and now not mentioning them at all." Whether he had so spoken was a fact, to which the jury alone could respond. We think, therefore, the instruction was properly refused. Where instructions are prayed, if granted, they must be put as the counsel requires, otherwise they are not what he demanded.

We concur with his Honor in his instructions to the jury, upon the third objection. It is unquestionably true, that if Joel Horne was, at the time the paper writing was executed, still domiciliated in South Carolina, it would not be a good will in North Carolina. For it had not the requisite number of witnesses, there being but

two and the laws of South Carolina requiring three. It was important then to ascertain whether, under the circumstances detailed by the witnesses, the deceased had acquired a domicil in this State, and thereby lost that of origin. On the part of the plaintiffs it was contended such was the fact, and on that of the defendants that the origin of birth still continued. After stating to the jury the facts bearing on this point, the Court left the intent, with which Joel Horne had come to this State, as a matter of fact for their inquiry. Upon the law he instructed them, that South Carolina, being the domicil of origin to the deceased, it continued so until he had acquired another; it could not be lost until then. And, to enable them to come to a proper conclusion, he instructed them, that if the deceased had left South Carolina and come to this State with a view to a temporary purpose, and with the intent, when that purpose was served, to return to his native State, he had acquired no domicil here, but if he had come to this State with the intent to live permanently in it, he had acquired a domicil here, and lost it in South Carolina, and the will was executed with the forms entitling it to probate here. To this charge we see no just exception. The domicil of a testator must govern the form, in which a will is executed.

The term domicil, in its ordinary and familiar use, means the place where a person lives, or has his home; in a large sense, it is where he has his true, fixed, and permanent home, to which, when absent from it, he intends to return, and from which he has no present purpose to remove. Two things, then, must concur to constitute a domicil—first, residence, and second, the intention to make it a home—the fact and the intent. In this case Joel Horne had a domicil in South Carolina—a domicil of origin, which continued up to a short period before his death, and up to that time, unless he had lost it, by acquiring a new one in this State. This was the

point to be decided by the jury, and to it their attention was drawn by the Court. There was one circumstance, which, we think, was nearly conclusive upon the question—it is, that the deceased himself considered North Carolina his domicil. In his will he styles himself "Joel Horne, of Anson County, North Carolina." The law governing the question was plainly and correctly stated to them. The plaintiffs relied much upon the fact, that, at the time the deceased executed the paper writing, his residence was in North Carolina. They were instructed that residence did not constitute a domicil, though it was *prima facie* evidence of it; thus guarding them from a mistake, as to that fact. In concluding his charge upon the question of domicil, his Honor instructed the jury, "if the deceased had come to Anson County in this State, for the purpose of settling there permanently or for an indefinite time, his domicil would be there, *although prevented from doing so by death.*" There is some confusion in the latter clause. It is obvious however, from the context of the whole sentence, his Honor did not mean, if he had been prevented by death from reaching this State; if he had died in *transitu*. In that case his domicil of origin would still have continued, for he would not have acquired a new one, and he had already told the jury that a domicil could not be lost until another was acquired. And in the same sentence, he had stated to them, if the deceased had abandoned his home in South Carolina and *had come to Anson, &c.* We presume the intention of the charge in this part was to instruct the jury, that the length of time, during which the deceased enjoyed his new home, was not material to the question of the new acquisition. In this view, the charge was correct. Residence for however long a time it may be continued, cannot constitute a domicil, without the intention of permanently making it a home, nor can the shortness of time, in which the new home is enjoyed, defeat the acquisition when ac-

companied with the intention, for in the latter there would be the *factum et animus*. These views are sustained by the cases of *De Bonneville and De Bonneville*, 6 Eng. Eq. Rep. 502. *Craige and Lewin*, 7th Do., 500. *Plummer and Brandon*, 5th Ire. Eq. 190, and *Story's* conflict of laws, ch. 3.

PER CURIAM. Judgment affirmed.

WILLIAM J. ARMSTRONG AND WIFE vs. MOSES BAKER AND OTHERS.

A probate of a will in common form cannot be set aside on a petition for a re-probate, without shewing some reason, why the former probate was wrong and should not have been allowed.

The mere fact, that all the parties interested in the estate of the deceased were not cited in the original probate is not, of itself, a sufficient ground for a re-probate.

Especially the Court will not set aside the probate in common form, upon the petition of the widow, who admits that the will was properly proved, but desires a re-probate to enable her to enter her dissent within six months thereafter.

Appeal from the Superior Court of Law of Edgecombe County, at the Fall Term, 1848, his Honor Judge DICK presiding.

This is an application to call in the probate of a script as the will of David G. Baker, deceased, which was granted to Moses Baker as the executor. The deceased died in September, 1844, leaving a widow, Catharine, and their four infant children. There is no copy of the in-

strument in the proceedings; but it appears from the allegations, that it was executed in the last illness of the deceased, and shortly before his death, and that it was attested by two witnesses: that by it, the deceased gave his estate to his wife during her widowhood, and, at her death or marriage, to his children, with a provision, that as the children came of age they should have certain shares of the property allotted to them respectively: and that Moses Baker, the father of the deceased, was appointed executor and guardian of the children. It was proved by the oath of the executor and the subscribing witnesses in the County Court at November term, 1844. Under it the widow remained in possession of the estate, consisting of land, slaves, and other chattels, until her intermarriage with Wm. J. Armstrong on the 3rd of February, 1846. They instituted the present proceedings on the 12th of the same month.

The allegation states: that the probate was had without citing the party, Catharine, to be present at the propounding of the script: that for a considerable time after the death of her husband, she was so overwhelmed with grief at her bereavement, that she took little interest in ascertaining her rights either under the instrument or in respect to its probate: that some months before her second marriage she was advised, that she might have the probate revoked, and that the script should be repropounded, in order that she might offer such objections to the same as she should be advised, or, in case she could not successfully oppose it, that she might be enabled to dissent from it after its proper probate: that she omitted to institute proceedings immediately for that purpose by reason of an agreement of the executor and guardian, Moses Baker, to come to a compromise with her at November term, 1845, of the County Court; with which he afterwards refused to comply.

The allegation then insists, that, as widow, the party

Catharine, had a right to a day in Court to show cause against the probate of the supposed will; and that, by reason that the probate passed without any citation to her, it was not binding on her, and she was entitled of common right to have the same called in.

Moses Baker put in a responsive allegation. It states, that the party deceased duly executed the instrument as his last will and testament, when he had perfect disposing, mind and memory, and that it was duly attested by the witnesses: that the party Catharine had full knowledge of the contents of the instrument, and, indeed, that it was made at her request and in her presence, and that the dispositions were adopted chiefly at her suggestion; that after the death of the deceased she expressed herself to be fully satisfied with the provision for her, and the desire that the instrument should be proved at the next Court, and that she knew it would then be propounded; and, in fact, one of the subscribing witnesses went to Court at her instance and by her assistance, that he might then prove it: that it was for those reasons, and those alone, that this party did not take out a citation for the said Catharine: that immediately after Court she was informed by the party, Moses, and several other persons, that the will had been proved, and also that she might dissent from it within six months after the probate: that during the whole period she rejected the advice with displeasure, and declared her determination not to dissent, as the will had been made in conformity with her wishes, expressed to her late husband, and she was satisfied with it: that she continued so to express herself for some months after May term, aforesaid, and until she began to receive the attentions of suitors and conceived the purpose of marrying again: that the party, Moses, made no compromise nor any agreement for a compromise in the premises.

Both in the County and Superior Courts there was an order to call in the probate, and the executor appealed to this Court.

B. F. Moore, for the plaintiffs.
Whitaker, for the defendants.

Ruffin, C. J. Armstrong and wife took no proofs. The executor examined several witnesses; but it is not necessary to state this evidence particularly, or further than to remark generally, that it substantially sustains the case made in the executor's allegation. The Court, however, deems the original allegation so essentially defective, that upon its face it ought to have been rejected—taking into consideration the vagueness of the terms in which the compromise is spoken of in it and the total failure of proof on the point. The whole force of the allegation consists in the fact, that probate was granted without formal citation to the widow. It is contended, that of common right she may, for that reason alone, have the probate recalled and require one in solemn form.

The Court does not accede to that position. It is clear, that in England a sentence in a probate Court concludes all who are privy to the proceedings, that is, who have a knowledge of them, either actual or by an allegation put in by the party, or by a citation on file, or by proof of witnesses. The cases on the subject were all looked into in *Redmond* v. *Collins*, 4 Dev. 430, and the rule stated as it now is. Those cases had been, to a considerable extent, recognised here in the cases of *Dickerson* v. *Stewart*, 1 Mur. 29, *Mass* v. *Vincent*, 1 Law Rep. 414, and *Jeffreys* v. *Alston*, Id. 634; in which it was held that the application for reprobate, by one not a party to the probate, must be supported by an affidavit of merits, as there was a discretion in ordering a second probate, and therefore, the Court must look to all the circumstances.

It ought therefore to appear in an allegation of this kind, that the person was not cognisant of the probate complained of, or, at all events, some other satisfactory cause must be assigned for not having intervened. Without such a statement it must be assumed, that the party was privy to the propounding of and probate of the will. This says, indeed, that she was much overwhelmed with sorrow at the time, and took no concern in the probate and provisions of the will. But the probate was about a month after the husband's death, and, without evidence to the contrary, it must be supposed that in the course of that period she became capable of giving such attention to the rights and duties arising out of her condition, as a widow and a mother, at least, as to seek proper advice respecting them. It appears in fact in the executor's allegation and proofs, that she not only had knowledge of the contents and probate of the will, but was active both in procuring its execution and probate. If this, then, were the application of one, as next of kin, instead of being that of the widow, it would not be sufficient to disturb a probate obtained, thus, at the party's instance.

But the principle would seem, in our law, to operate more strongly against the widow than the next of kin. For the right to interfere in a question of probate belongs to a party in interest; which must mean some person, whose rights will be affected by the probate of the instrument, to the prejudice of the party. But the statute allows a widow to dissent from her husband's will, and, if she signify it within six months after the probate, remits her to her dower and distributive share. Hence it would appear, that, in a legal sense, she can have no interest in contesting the probate; for it is at her own election to abide by or refuse the provision for her. Therefore widows never become parties to issues of *devisavit vel non* in opposition to the will—having no interest in the dispute. This is the first instance, that is known, in

which a widow has in any way attempted to interfere with a probate. By dissenting she gets clear of the will at once, whether it be good or bad. By not doing so she elects to take under it, and, it would seem, ought to be concluded from asserting any right in opposition to it.

But, whether these suppositions be correct or not, the Court holds it clear, that in the case made in this allegation the widow has no right to disturb the probate. There is no statement in it, which in the least impeaches this instrument as not being in fact and law the will of the party deceased. No reason whatever is assigned, why it should not be admitted to probate, either in respect to the *factum* or capacity of the party. Indeed, it is admitted by the counsel, that the will is good, and the party would not oppose another probate, but allow it to pass of course. Then, to what purpose shall the probate be revoked? It is avowed, that it is for the single one of enabling the party to enter her dissent. It could not be yielded without further examination, that the widow is not concluded by her not dissenting in due time from the first probate, and that her time might be enlarged to six months from the reprobate. But, supposing it could, the probate ought not to be called in for such a purpose merely. A proceeding of this kind is sustained upon the principle, that injustice has been done to those who would be entitled to the estate, if there were no will, by improperly admitting to proof a paper as a will, which in truth was not the will of the deceased. The sole foundation for recalling a probate is, that by allowing it to stand, it would be a prejudice to persons, who would succeed to the property if there were no will and who can show that this is no will, if allowed the opportunity. That is the only consideration, which ought to induce a Court of Probate to annul its previous acts; for the probate in common form is not void, but is valid unless impeached; and it ought not to be impeached by any one, who cannot al-

lege, that in point of fact or law it was wrong. Therefore a widow, at all events, cannot have one probate of her husband's will recalled merely to let another pass—as it must do upon the case made by her. For, in such a case, the judgment does not arise from the first probate of a good will, but from her election to take under it or her laches in not signifying her dissent. To authorise such a proceeding, it ought to be really for the purpose of determining a question between a will and an intestacy, and not for that of merely affording to the widow another election to hold under or against the will.

For these reasons the Court holds, that the decisions in the Courts below were erroneous, and must be reversed; and the original probate must stand. This must be certified to the Superior Court to the end that a *procedendo* may thence be awarded to the County Court to make the proper orders in accordance herewith.

PER CURIAM. Ordered accordingly.

JOHN MYERS AND SON *vs.* JEREMIAH BEEMAN & AL.

Where A. had, in an attachment against B. been summoned as a garnishee and admitted that he owed B. in a certain negotiable note dated 1st of April, 1846, payable 6 months after date, and it appeared that before the issuing of the attachment, the note, not then being due, had been *bona fide* transferred to an indorsee, *Held*, that a judgment against A. the garnishee in the attachment, was no bar to the right of the indorsee to recover on the note.

Appeal from the Superior Court of Law of Pitt County, at the Fall Term, 1848, his Honor Judge Dick presiding.

This was an action of assumpsit upon a promissory note. The pleas—general issue, statute of limitations, and specially that on the 15th of April, 1846, the defendants were garnisheed at the instance of one Pitt, and former judgment since the last continuance.

The note, sued on, was dated New York, April 1st, 1846, and was payable to one Taylor, six months after date. The execution by the defendants as makers was admitted. The plaintiffs proved the endorsement by Taylor to Ingles. on the *8th of April*, 1846, by Ingles to Adams and by Adams to the plaintiffs, who commenced this suit of the 7th on October, 1848.

The plaintiffs offered evidence to show that the endorsement by Taylor was for valuable consideration.

The defendants proved that on the *15th of April*, 1846, one Pitt sued out an original attachment against Taylor as a non-resident debtor, and on the same day had the defendants garnisheed, who at May term of the County

Court of Edgecomb, admitted their indebtedness to Taylor by reason of said note, and such proceedings were had, that, at November term, final judgment was rendered in favor of Pitt against Taylor, and the debt, now sued on, was condemned in their hands for the payment thereof.

The defendants alleged, "that the endorsement by Taylor to Ingles was fraudulent and without valuable consideration, and proposed to prove declarations of Ingles, that the note was received from Taylor as collateral security for a debt which Taylor owed him." This testimony was rejected.

The Court charged, that, if the endorsement of Taylor on the *8th of April*, was *bona fide*, and for valuable consideration, the plaintiffs were entitled to recover, notwithstanding the defendants had been garnisheed on the *15th of April*, and final judgment rendered against them at the November term of the County Court of Edgecomb.

A verdict was rendered for the plaintiffs, judgment, and appeal by the defendants.

Rodman, for the plaintiffs.
Biggs, for the defendants.

Pearson, J. We see no error in rejecting the declarations of Ingles. If made *after* his endorsement, they were clearly inadmissible. It does not appear by the case when they were made, and it was incumbent upon the defendants to show, that they were made *before* the endorsement and to have that fact stated in the case, as a foundation for their exception.

The instruction, that if the note was endorsed by Taylor *bona fide* before the defendants were garnisheed, the proceedings under the attachment of Pitt would not bar the recovery, is entirely correct. Taylor had the same right to transfer the note by endorsement, provided it was not colorable and for his own benefit, as he had to

transfer any article of property before a lien had attached to it by the *teste* of an execution or otherwise; and, admitting that a garnishment creates a lien upon all debts due to the original debtor from the time notice is served, in this case it had been transferred some days before and was no longer a debt due to Taylor.

It was the folly of the defendants to admit an indebtedness to Taylor at May Court upon a negotiable note made one month before. The admission ought to have been qualified—they were only indebted to Taylor, provided the note had not been endorsed. It is true, they had no notice of the endorsement, but an endorsee is under no legal obligation to give notice to the maker, even when the endorsee and endorser are non-residents. The endorsee is not to anticipate that an attachment will issue.

The defendants were guilty of still greater negligence in allowing a final judgment in November, which was after this action was commenced. An application should have been made to amend, by withdrawing the admission of indebtedness to Taylor, as soon as they were informed of the endorsement, and the amendment ought to have been allowed—truth required it, for as soon as the note was endorsed, the defendants ceased to be the debtors of Taylor, and became the debtors of the endorsee.

It may be, that the defendants can be relieved against the judgment of Pitt, by a writ of error *coram nobis*, for error as to the fact of their indebtedness to Taylor, but this is a matter in which the plaintiffs have no concern; they are the owners of the note and have a right to collect it.

Per Curiam. Judgment affirmed.

RICHARD H. MOSBY vs. CHARLES G. HUNTER.

A. declared against B. for the breach of an agreement in writing signed by B. in the following words, "R. H. Mosby has promised to procure for my mother a pension from the Government of the U. S. supposed to be due to her as the widow of Lieut. Charles Gerard, and in the event of his doing so, I promise and oblige myself to give the said R. H. Mosby one half of the money due her on account of the said pension. Given under my hand this 3rd day of December, 1838. Charles G. Hunter." *Held*, that this agreement referred to a pension to which the widow was then entitled or supposed to be entitled, and not to a pension to which she became entitled under an Act of Congress subsequently passed. *Held* further, that although the sales of pensions are by law prohibited, yet the Court could not infer from this agreement, though a jury might, that the agreement was made by the son, as the agent of his mother, it did not transfer any title to any portion of the pension, and therefore was not, on that account, in itself invalid.

Held, also, that upon a count for work and labor done, A. could not recover from B., because his services did not enure to the benefit of B., and therefore the law would not imply a promise.

Appeal from the Superior Court of Law of Warren County, at the Fall Term, 1848, his Honor Judge Dick presiding.

This was a special verdict, subject to the opinion of the Court, upon the following facts. The plaintiff declared in assumpsit in two counts. In the first count, upon a written agreement, signed by the defendant in the following words, "R. H. Mosby has promised to procure for my mother a pension from the Government of the U. S. supposed to be due her as the widow of Lieut Charles Gerard, and in the event of his doing so, I promise and oblige myself to give the said R. H Mosby one half of the money due her on account of the said pension.

"Given under my hand, this 3rd day of December, 1838.

"CHAS G. HUNTER"

The second count was the common one for work and labor done.

The plaintiff thereupon proved, that after the said agreement of the defendant and in consideration thereof, the plaintiff undertook and agreed to act as the agent of Mrs. Hunter, the mother of the defendant, in preparing the proper documents and procuring the proofs required for asserting the said Mrs. Hunter's claim to a pension of $320 per year for five years, to which she was or might be entitled under the Acts of Congress, as the widow of Charles Gerard, who was a Lieutenant in the second North Carolina Regiment in the Army of the U. S., to take rank as such from 1st June, 1778, under and by virtue of a commission dated 6th of March, 1779. Accordingly on the 3rd day of December, 1838, the plaintiff wrote or caused to be written the necessary declaration of the said Elizabeth Hunter, and compiled evidence in support of her claim to a pension, under the Act of Congress of the 7th July, 1838, entitled "an Act granting half pay and pensions to certain widows," which said declaration and the proofs aforesaid, the plaintiff presented and filed at the proper department of the Government, at Washington City, and prosecuted the said claim before the said department. The said claim remained some time in the said department, undetermined, and on the 24th August, 1842, the said application was called up for a decision by the Commissioner of Pensions, at the instance of the Hon. R. M. Saunders, a member of Congress, and determined in favor of the said Elizabeth Hunter on the 29th August, 1842. It was proved that the said determination was made upon the proofs compiled and filed by the plaintiff, and without any other additional proofs or documents, excepting that the Hon. R. M. Saunders testified to the credit and good character of a witness, whose affidavit had been heretofore filed by the plaintiff, in support of the said Elizabeth

Hunter's claim, and it was further proved, that the Hon. R. M. Saunders called up said claim for a decision and procured the same by the solicitation of the plaintiff, and at his request, the said plaintiff acting or professing to act as the agent of Mrs. Hunter as aforesaid. It was further proved, that, pending the application aforesaid before the Department for the allowance of pensions, and before a final determination thereon, to-wit, on the 23rd Aug. 1842, Congress had passed an Act, that the marriage of the widow, after the death of her husband, for whose services she claims a pension under the Act of 7th July, 1838, shall be no bar to the claim of such widow to the benefit of that Act, she being a widow at the time she makes application for a pension. It appears from the proofs and documents filed by the plaintiff in Mrs. Hunter's case, that she was married to Charles Gerard, on the 28th of October, 1789, who died on the 6th of October 1797; that she was married to Henry Hunter on the 25d day June, 1805, who died on 13th day of August, 1823; that she was a widow at the passage of the Act of 7th July, 1838, and also at the date when she made her application for a pension. It was further proved that the said Mrs. Hunter obtained a pension certificate on the 29th of August 1842, as aforesaid; and that the same has been paid, to-wit: $320 per year for five years, making $1600, but the same was neither allowed nor paid until after the Act of 23rd August, 1842. The defendant, upon demand afterwards, refused to pay the plaintiff the one half of the said sum, so recovered by Mrs. Hunter, his mother, and in like manner refused to pay the plaintiff any thing for his agency and services in the premises and afterwards this action was brought, &c.

Upon the trial, the defendant contended, that the plaintiff had no right to a verdict on the 2nd count of his declaration, and the Court being of the opinion with the defendant, directed the jury to find for the defendant on

the said count, because the plaintiff should have brought his suit against Mrs. Hunter for the matters in said count, and cannot maintain an action against the defendant, except upon his *special* agreement.

The defendant further insisted, that as to the first count in the plaintiff's declaration, he cannot recover. 1st. Because the said agreement with the plaintiff, although made by the defendant, was in contravention of the Act of Congress and in violation of the policy of the Government, and the Acts of Congress, which declare all assignments or sales of pensions void, and that the said agreement, although made with this *defendant*, and in consideration of the plaintiff's undertaking to prosecute the said claim and not with the pensioner herself, is upon its face an evasion of the Act of Congress and the policy of the Government. 2nd. Because the said agreement, although made with and by the said defendant, did not stipulate for the payment of any sum of money to the plaintiff, except it might be for procuring in her behalf a pension *due* to the defendant's mother, at the time of the said agreement, to-wit: 3rd Dec. 1838, and that the pension, in fact procured for his said mother, was not due to her at the time aforesaid by force of any Act existing at that time, but that the pension, procured for her, became due to her by force of the Act passed 23rd August, 1842: and that, according to the true interpretation of the laws of the United States, the said pension became due to her, after the said agreement, and, therefore, the defendant, according to the true interpretation of his said agreement in writing, did not become bound to pay the plaintiff.

It was agreed, that the said verdict might be taken, subject to the opinion of the Court upon the points reserved; and that, if the Court should be of the opinion, that the law was in favor of the defendant, the verdict was to be set aside and a non-suit entered. If otherwise, judgment to be entered for the plaintiff, for the amount

of the said verdict and costs. And, if upon consideration, the Court should be with the defendant, upon the points reserved in the first count, the plaintiff has leave to move for a new trial for misdirection in respect to the second count.

Upon consideration of all the said matters, the Court, *pro forma*, adjudged the points reserved to be all in favor of the plaintiff, and judgment accordingly is entered in favor of the plaintiff for $1096, with interest on $800 from the 16th day of October, 1848, until paid, and costs.

From this judgment the defendant appealed to the Supreme Court.

W. H. Haywood, for the plaintiff.

Whitaker, for the defendant.

Ruffin, C. J. The declaration has two counts: the one, on the special agreement; and the other, the common one for work and labor. The verdict was given for the plaintiff on the first count, subject to the opinion of the Court on points reserved.

On the first of those points this Court concurs with his Honor. There are several Acts of Congress which avoid a sale, assignment, or transfer of a pension, or any part of it, under all circumstances, and to all intents; and, of course, if the Court could find, as a matter of law, that this was a contract of that character, it would be held to be void, as contravening the policy and enactment of the Statutes. To constitute a sale or assignment of a right, it is essential that the contract for that purpose should be that of the person to whom the right belongs; either made by the owner in proper person, or by some other on behalf or with the knowledge and concurrence of the owner. The mere unauthorised bargain of a stranger can have no effect whatever in transferring the pension. It cannot be denied, that, considering the relation of a

mother and son, and the provisions of the Acts of Congress touching transfers of pensions, and the terms of this agreement, it seems highly probable, the treaty was made with the mother, or with the son on her behalf and with her privity, and that it was put purposely into this form, as a shift and device to evade and defraud the law by keeping out of sight the real intent and giving the transaction the appearance of a contract with the son and in his name, while there was in reality an undertaking between the plaintiff and the mother and son, that the whole was done on the mother's account, and that she would fulfil her son's engagement. If such was the truth of the case, there is no doubt, that it would come within the statutes. But it is competent for a jury only to draw inferences of the pensioner's privity from those circumstances. They might ask, if the object was not to evade the law, why the plaintiff did not bargain with the mother directly, instead of the son, for the payment to the plaintiff of one half of the pension itself; and, nothing appearing to the contrary, they might, with much reason, infer, as a fact, that such was the object, and that the mother was cognizant of the contract and was to be bound by it. But the Court cannot, as a matter of law, infer the same thing. For, it is possible, that the defendant might have treated without his mother's privity, and from filial regard might have been moved to pay out of his own pocket one half as much as the mother might gain; and, for aught the Court can see in the instrument, such might be the fact in this instance. If so, it could not be deemed the assignment of the mother; and, if it be not hers, it is not an assignment or transfer at all, and, so, not within the Acts of Congress.

Upon the second point reserved, the Court is of opinion from the terms and scope of the contract, that it referred exclusively to a right to a pension then subsisting or supposed to subsist; and that, as there was no right at

the time, the bargain and the subject of it failed together. The defendant had no notion of employing the plaintiff, nor had the plaintiff any intention of engaging, to solicit from Congress the grant of a pension to this lady. But the purpose was to establish her right, as the widow of an officer of the revolution, to one already granted, as they understood. The language is, that the plaintiff "promised to procure for the defendant's mother a pension *supposed to be due her* as &c., and in the event of *his doing so*," the defendant promised to pay him one half the pension. This language agrees with what might have been expected from the nature of the subject. It is not uncommon—though not at such prices, it is to be hoped—to employ persons to discover and prepare the requisite proofs to entitle one to a pension under a law already passed. But it is, we believe, quite unusual, if not unknown, to appoint one as a Solicitor to Congress to procure the passing of a law granting pensions. Indeed, it is not pretended, that the plaintiff performed any such service as that. The claim is, that under evidence prepared to establish, as was supposed, an existing right to a pension, the lady was decided to be entitled to a pension granted four years afterwards. Such a case was not at all in the view of the parties. They were not treating for the division of the bounty of the Country, which might never be granted and was altogether uncertain in amount; but for that of a known amount. Both the words of the agreement and the circumstances repel the plaintiff's claim.

As the plaintiff's services did not enure to the benefit of the defendant, he is liable only as far as he expressly agreed. In such a case the law cannot imply a promise. There was, therefore, no error in directing the jury to find for the defendant on the second count.

But, as there was an error in the finding on the first count, the judgment must be reversed; and, under the

agreement in the record, judgment must be entered for the defendant as upon a non-suit.

PER CURIAM. Judgment accordingly.

CHARLES W. CULLIFER *vs.* JOHN R. GILLIAM & AL.

The power of an arbitrator is derived, entirely, from the agreement of the parties, as expressed in the submission, and their award must be made in strict accordance with it, and must neither go beyond nor omit any thing embraced in it.

Where the words of an arbitration are ambiguous, such a construction ought to be given to them, as will best co-incide with the apparent intention of the arbitrators.

Where the submission was in the following words, "We hereby bind ourselves to abide the damage awarded to C. C. by C. J and W. W. for the overflowing a certain tract of land, by our mill pond, this 4th of July, 1847. Signed by G. & B.;" and the award was, "We the undersigned have this day viewed the land belonging to C. C., covered by the water of the mill, *late* the property of G. and B., and do assess the damages, which the said C. C. has sustained for the year 1847 at $26 26, for the year 1848 at $23, for the year 1849, at $23, for the year 1850 at $16, and for the year 1851 at $16, and due respectively the January succeeding each year, that is, the damage for 1847 due 1st January, 1848, and so for each year; *Held*, that the arbitrators exceeded their powers and the award was void, because the apparent intention of the submission was only to refer the amount of damages due at the time of the submission.

The case of *Gilbert* v. *Jones*, 1 Dev. and Bat. 339, cited and approved.

Appeal from the Superior Court of Law, of Bertie County, at the Fall Term, 1848, his Honor Judge BAILEY presiding.

This is an action of debt, commenced by warrant upon the following award: "We, the undersigned, have this day viewed the land belonging to Charles M. Cullifer, covered by the water of the mill, *late* the property of John R. Gilliam and Levin Butler, and do assess the damages, which the said Cullifer *has* sustained, for the year 1847, at $26 26; for the year '48, at $23; for the year '49, at $23; for the year '50, at $16, and for the year '51, at $16; and due, respectively, the January succeeding each year —that is, the damage for 1847, due 1st January, 1848, and so for each year." Signed and sealed by the arbitrators, 7th January, 1848. The submission, on the part of the defendants, is, as follows. "We hereby bind ourselves, to abide the damages awarded to Charles Cullifer by Charles Jacocks and William Williams, for the overflowing of a certain tract of land, by our mill pond, this 4th of July, 1847." Signed, Gilliam and Butler. The submission on the part of the plaintiff bore the same date and was of similar import. The action is brought to recover the assessment of the damages for 1847. The jury found a verdict for the plaintiff, subject to the opinion of the Court, and the Court being with the defendants, a judgment of non suit was entered—from which the plaintiff appealed.

P. H. Winston, Jr., with whom was *Biggs*, submitted the following argument:

Two grounds were taken below.

First. That the submission so restricted the referees that they did wrong in giving damages for overflowing after 4th July, 1847.

Secondly. That the referees did over-step this restriction, and that in each case the ground appeared on the face of the paper.

His Honor being of opinion that both grounds did thus

appear, non-suited the plaintiff after the verdict of the jury.

The plaintiff insists that in the Supreme Court the judgment of non-suit should be reversed, and judgment given for him on the verdict.

It is clear, that unless both grounds do appear on the face of the papers, as contended for, the judgment must be reversed. Either not thus appearing will give the plaintiff a judgment.

First then, were the referees restricted as contended for? What did the parties intend should be settled by the referees? They intended either the whole damages, the damages to the time of the award; or the damages only which the plaintiff had suffered up to 4th July, 1847. If they intended either of the two first, then this action must lie, for nothing is claimed now but the damage incurred before the date of the award.

The subject matter of reference may be considered in construing a submission. Here then was an injury, which, if not completed on the 4th July, 1847, was at least of a continuing nature, and was (as the defendants say,) going on at the very instant of the submission. If the question of intention were left to a jury, not one in a thousand would hesitate. Arbitrators are a Court chosen by the parties, and the law, obeying good sense and reason, encourages the settlement of difficulties in this way: "No strained construction shall be resorted to, to make the submission and award disagree." True it is that a distinct substantive matter arising after submission cannot be considered by referees. But this is not a case within that rule. A money dispute, arising after reference of a land dispute, cannot be decided by the arbitrators. But suppose a man wounds my slave the 1st January. The 2nd, we refer the damage. The 1st February, an award is made that I shall receive $10 a month for six months, payable monthly. This is like the case under

consideration. The body of the injury in both cases is complete at the reference. The resulting damages however are in the future. Could we not get two physicians to say how long a broken leg would require to become firm. The negro might go on lessening in value all his life. The same is true in referring the damage for slander. The offence is complete by the words. The damage goes on *ad infinitum*.

Again: A Court of law as a general rule can consider nothing arising after the writ is commenced. And it is on the ground that nothing but the first dispute was referred to them. If, though, an exception is made to this rule in the case of damages from mill ponds, and the exception to the rule in question be correct, why not let referees on this subject, also, act as Courts of law do. The Courts are daily in the habit of giving prospective damages for overflowing land.

Again: The submission in this case would have been as good without as with writing. No rule requires writing. Therefore this submission could have been explained, varied, or even contradicted by parol evidence of subsequent assent of the parties. *Smith on Contracts, page* 27. Did not his Honor then infringe a right of the plaintiff in taking it as conclusive upon the face of the submission?

Should the law find out that these parties intended the referees to assess the damage until the 4th of July, when did the damage begin? If any thing less than the whole damage was to be assessed, would not the parties have told them to assess it from such a day to such a day? Why have the time with no certain beginning, and perhaps with 4 or some other number of odd days?

The parties did not intend to limit the referees as contended for. "The damages," means, unless restricted, *all* the damages.

Secondly. If the referees were restricted, as contended for, does it appear by their award that they have overstepped the restriction?

This is an action of debt on an award, and the law is, that only so much of the award as the action refers to is to be read or considered. 1 *B. M.* 278. The award, so far only as it refers to the damages for the year 1847, is therefore to be considered.

How then did his Honor find out that in giving $26 26 for the year 1847, the referees took into account any overflowing after the 4th July, 1847. When an award directs any thing to be done up to the time of the award, and the submission extended to the time of reference only, it shall not be intended that any new matter arose in the interval, and unless such matter be shewn, the award will be good. 12 *Mod.* 116, *Comb.* 418. The award says that for the year 1847, the referees assess the damages at $26 26, but they do not say that the overflowing was continued without interruption from 1st January, to the last of December. Indeed, it is a well known fact, that generally, the water in mill ponds is higher from about the last of January until the 1st of June, than at any other time of the year. And in case the pond in question was a large one, the edges of it might encroach on the plaintiff's land during the Spring, but not at any other time. It might be that a corn crop was prevented by the water being there at planting time. Or even that some other crop less valuable than corn, by $26 26, was cultivated, because of the dampness produced by past overflowing. It may have been a fact that the pond was drawn off on the 3rd of July, and filled up again the 2nd of January, following.

How then does it appear that damages were given for overflowing subsequent to the 4th of July?

Indeed it would be quite as plausible for the defendants to take the ground that it appeared by the submission

that the whole damage was submitted, whereas the award did not appear to cover the whole damage.

"In all cases an award should be construed favorably and liberally." *Billing. p.* 78.

"No man ought to take his chance before referees, and being dissatisfied with their decision, to try his chance before a jury."

This award was evidently given by the referees in analogy to the manner in which juries give damages on a petition. The costs of a jury were doubtless what the parties were willing to avoid. The award looks fair on its face, and unless the law be perfectly clear against it, the proceeding ought to be sustained. The interference of any cunning technical rule of law, with the universal sense of mankind, ought to be avoided if possible.

W. N. H. Smith, for the defendants, submitted the follow argument:

The submission is, of "*damages*" *sustained* by the over-flow of the plaintiff's lands, and not of the value of the *easement* or *right* to over-flow. These damages are commensurate with the injury *already* sustained, such as would be recoverable by action brought at the *date* of the submission.

If this be the true construction of the agreement to refer, it is submitted, that the award is void by *excess*.

The award embraces *annual* damages for several successive years, extended over each year, and estimates the injury as resulting from a supposed continuation of the ponded water for that time.

Nor is this *excess* separable from the matters *within* the terms of the submission. The first assessment of damages is for an *entire* (the preceding) year.

An award of several things *within*, and of others *without* the submission, is good for the former, if they are distinguishable from the latter; but if the award be of

one entire sum, the Court cannot discriminate and apportion it to the matters submitted, and those not submitted. The whole award is in such case void.

5 *Com. Law. Rep.* 20. *Watson on Awards, Law Lib. page* 241.

In submitting a term for years, and all things dependent thereon, an award to pay a sum at a future day for future rent is void, as the rent may cease. *Watson on Awards, Law Lib. page* 192. So in the present case, the award is predicated upon the supposition of a continuance of the over-flow, for several years, and assumes to measure the damages it *will cause* for each of those years. But the over-flow may vary, or the mill go down, and the over-flow wholly cease, and with it the damages supposed to result.

Second. It is further insisted, if the more enlarged construction be allowed, that the award is *insufficient*, for not including *all* the *matters* submitted.

The award is not of a *given sum* or *sums*, (payable in instalments) for *all* damages, heretofore or hereafter to be sustained; but it is, by its plain terms, an assessment for five years, of the damages for each of those years severally. It directs a sum certain to be paid *for each* year, at its termination. In analogy to the redress provided by the Act of Assembly, it ascertains damages for several years, leaving undetermined those that may follow, to be the subject of new controversy.

It is submitted, that, construing the submission in a liberal sense, it was to embrace all the matters connected with the ponding of the water, and remove all cause of future dispute.

The referees have not, in this aspect of the case, *passed* upon all the *matters submitted*, and their award not covering the entire subject of dispute, but being partial, is variant from the submission, insufficient and void.

4 *Com. Law Rep.* 421. *Watson on Awards, Law Lib. pages* 242, 243.

NASH J. The power of an arbitrator is derived, only, from the agreement of the parties, as expressed in the submission, and their award must be made in strict accordance with it, and must neither go beyond nor omit any thing embraced within it. The first enquiry, in this case, is as to the nature and extent of the submission.—The defendants were owners of a mill, and their dam ponded the water on the land of the plaintiff and occasioned an injury to it. On the 4th of July 1847, the parties entered into an agreement to refer the matter in controversy. They selected two gentlemen, in whom they had confidence, to settle the dispute between them, in order, we presume, to avoid the delay and expense of a law-suit. What, then, did they submit? The language of the agreement is not so explicit as it might have been, but sufficiently so, we think, to show their intention. The defendants bind themselves to abide the damages, awarded to Charles Cullifer, by Charles Jacocks and William Williams, for the overflowing of a certain tract of land by their mill-pond. We understand the parties to mean, that the arbitrators should assess the damages then sustained, to wit, the 4th of July 1847. There is nothing in the submission, which looks to damages to be sustained after that time. They wished to make a lumping matter of it, and that they might know what sum, *in solido*, they should pay for *all the present* injury. This was not done by the arbitrators; but they give their judgment, that the defendants shall pay a certain sum, that for which the action is brought, as damages for the whole of the year 1847.

This, we think, was error, as giving damages for time not embraced in the submission. It is, however, urged on the part of the plaintiff, that, from the words used in the award, it was the intention of the arbitrators to confine their judgment to damages sustained previous to the 4th of July, 1847, and that the award will well bear that

construction. When the words of an award are ambiguous, such a construction ought to be given them, as will best coincde with the apparant intention of the arbitrators. *Watson on Awards*, 105. Here, however, the arbitrators do not leave us in doubt as to their meaning; they say they assess the sum of $26 26, "for the damages, which the said Cullifer has sustained for the *year* 1847." In this language there is no ambiguity; if there was, it is made plain by their going on to assess damages for the next succeeding four years, and give no damages for the time between the 4th of July 1847 and the 1st of January '48

It is further argued, that it was the intention of the parties to the award, that the arbitrators should assess the damages under the provisions of the act, of Assembly; and that such was the view taken by them. If this be so, the award is not the less defective. The 13th *sec. of the* 74th *ch. Rev. Stat.* directs the jury to "make up their virdict, as to the sum, which the petitioner is entitled to receive as an annual compensation for the damages sustained &c," "which verdict shall be binding between the parties for five years, unless the damages should be increased, by raising the water or otherwise, if said mill is kept up." It is not the intention of the law, that the judgment for the damages, shall, in every event, be binding on the parties for five years. If the defendant increase the injury within that time by raising his dam, the plaintiff may have his damages increased; if the defendant should abate the nuisance altogether, he may, by an *audita querela*, or some other action, set aside the judgment for the residue of the damages. *Gilbert* v. *Jones* 1st Dev. &Bat. 339. If it was the intention of the parties, that the arbitrators should pursue the provisions of the act, and of the arbitrators so to do, they have not made their award in conformity to them. They have made no provision whereby the plaintiff can be redressed

should the dam be raised, nor, for the defendants if, they should have taken it down the day after the award was made. The award, therefore, in this view of it, is defective. It does not embrace all the matters referred and is not final in any aspect. In whatever light we consider the award, it is defective, and the plaintiff cannot support his action.

PER CURIAM. Judgment affirmed.

JOHN L. LEE *vs.* EDWARD PATRICK, ADM'R, &c.

Where a party moved to be permitted to shew a paper to a witness for the purpose of refreshing his memory, which motion was refused and an appeal taken, it must appear in the case sent up, what were the contents of the paper, that the Court may see whether they were such as were calculated to have the effect proposed.

The 17th Section of the 26th Chapter of the Revised Statutes in relation to administrators, was intended for the ease and security of the administrator, and a strict performance is required on his part.

Where in an action against an administrator, a reference is made to a commissioner to take an account of the administration of the assets, and the commissioner makes a report, which is confirmed, this report is conclusive and the administrator is not required to produce an outstanding judgment stated in the report, the amount of which was more than sufficient to cover the balance of the assets in his hands.

Appeal from the Superior Court of Law of Craven County, at the Spring Term, 1848, his Honor Judge DICK presiding.

This was an action in assumpsit, to recover for work and labor done for the defendant's intestate. The defendant pleaded the general issue, fully administered, and

the Act for the protection of administrators. The plaintiff having proved his cause of action, the defendant shewed that he took out letters of administration upon the estate of his intestate at May term, 1842, of Craven County Court, and also proved that within two months thereafter, he caused an advertisement for the creditors to present their claims for payment to be posted up at the door of the Court House of Craven County, also at the County wharf in Newbern. Copies of these advertisements, properly proved, were produced to the Court, held for the County of Craven, at its August Sessions, 1842, and ordered to be filed. He then offered in evidence, the copy of another advertisement, similar to the other two, upon which was the affidavit of one Green, made at the November term, 1842, of Craven County Court, and which had been ordered by the County Court to be filed with the records. This latter evidence was ruled out by the Court. The defendant then offered to prove by one Stephenson, that he had seen an advertisement, signed by the administrator of John Patrick, notifying the creditors to present their claims, but in what year or month he could not tell. This testimony was rejected. For the purpose of refreshing the memory of Stephenson as to the time, the defendant proposed, that he should look at the copy, certified by Green; this the Court refused.

The cause had been referred to James G. Stanly, who made a report, which, not being excepted to by either party, had been confirmed by the Court. The commissioner, in stating the debit and credit side of the administrator's account, strikes a balance of $930, as the amount of assets in the defendants hand. He goes on, however, and states that the defendant claims to retain that balance, to satisfiy the following sums &c., the 3rd of August 1844—namely, at "May Term 1842, of Green County Court, by J. M. Patrick, by his guardian Willis Dixon, judgment *quando* against Ed. Patrick, adm'r. of

John Patrick, $1281 88 1-2." The defendant's counsel contended, that by the commissioner's account and report, the defendant had fully administered, and that the balance of the assets, as stated in the body of the account was subject to the payment of the judgment *quando* against him, in preference to the plaintiff's demand, and requested the Court so to charge the jury. The Court instructed the jury, that it appeared from the report, that there was a balance of assets in the hands of the defendant sufficient to satisfy the plaintiff's demand: that it was incumbent on the defendant to show the existence of the judgment *quando*, by producing a copy of the record, and as he had failed to do so, they might find for the plaintiff if he had established his claim to their satisfaction.

There was a verdict for the plaintiff and from the judgment on that verdict, the defendant appealed.

No counsel for the plaintiff.

J. H. Bryan, for the defendant.

Nash, J. The 16th Sec. of the 40th Chap. Rev. Stat. requires executors and administrators, within two months after their qualification, to advertise creditors to bring in their claims, within the time prescribed by law, and requires that the advertisement shall be made at the Court House door and other public places. The 17th section provides the manner, in which the evidence, to prove the fact, may be perpetuated. The defendant in this case proved the advertisement at the Court House door and one public place—and the evidence to show it had been made at a second was insufficient under the Act. The notice, certified by Green, was not filed in the office at August term of the Court, which was the term next succeeding the qualifying of the defendant, as required by the Act, but at the November term succeeding. Neither,

as far as the case discloses, did the affidavit of the witness Green, on the notice, show at what time he saw it posted up nor where. The testimony of Mr. Stephenson was equally uncertain as to time; the nearest he could come to it was, that he saw the advertisement posted up at his house, which was a public place within the County, within six or twelve months after the death of the intestate. The defendant failed to show a compliance with the requisitions of the Act, and was thrown back upon his right to prove the fact in some other way. The Court committed no error in rejecting the evidence he did offer. The provision in the 17th section is obviously made for the ease and security of the administrator, and a strict performance ought to be and has been required of him. *McLin* v. *McNamaru*, 2 Dev. & Bat. Eq. 82.

For the purpose of refreshing the memory of the witness Stephenson, the defendant proposed to show him the notice certified by Green, which was refused by the Court. If the Court erred in rejecting the testimony, we cannot reverse the judgment for that reason, as the case does not set forth the notice, so as to enable us to see, that its contents were such as were calculated to have the effect proposed. It was not suggested to the Court, in what way the notice could refresh the memory of the witness, as to the time he saw the notice which he speaks of, nor can we perceive its relation to it. *Burrough* v. *Martin*, 2 Camp. 112.

In the progress of the trial, a reference was made by the parties to Mr. James Stanly, to take an account of the defendant's administration of the assets of the intestate. The commissioner made his report, which was confirmed by the Court, neither party having made any exception. The referee, after stating the receipts and disbursements of the defendant, reports that there were assets in his hands to the amount of $930 31, a sum more than sufficient to satisfy the plaintiff's debt. But

he goes on and states that the defendant claims to retain that balance to pay certain sums due to him from his intestate, and to pay an unsatisfied judgment *quando* rendered against him as administrator of Ed. Patrick at May Term 1843, of Greene County Court, at the instance of John M. Patrick, by his guardian Willis Dixon for the sum of 1281 8¾. The defendant's counsel requested the Court to charge the jury, as set forth in the case, that the defendant had a right to retain the amount reported as in his hands to pay the *quando* judgment. This was refused upon the ground, that the defendant had not produced the record of the judgment. In this, we are of opinion, his Honor erred. The reference to Mr. Stanly was not a matter of right belonging to either of the parties, the action not being on the administrator's bond, but was made by them, as a satisfactory and expeditious mode of ascertaining the state of the assets.

We are of opinion, that as the plaintiff used the report to charge the defendant, the latter was entitled to use it to his discharge, and that his Honor erred in refusing the instructions prayed for. The plaintiff gave no other evidence of assets, and the question turned upon the construction of the Report. That we understand clearly, to find out—standing demands, preferable to the plaintiff's, to a greater amount than the balance of $930 31. For he refers to certain depositions and records, establishing certain demands to the amount of $837 81½ against the estate in favor of the defendant.

Per Curiam. Judgment reversed and a *venire de novo* ordered.

THE STATE *vs.* JOHN P. WILLIAMS.

An indictment will lie under our Statute for feloniously taking and carrying away a runaway slave, "with intent to dispose of him to another," &c. even though the taker did not know who was the owner of the slave.

The possession of a stolen thing is evidence to some extent, against the possessor, of a taking by him. Ordinarily, it is stronger or weaker, in proportion to the period intervening between the stealing and the finding in possession of the accused; and, after the lapse of a considerable time, before a possession is shewn in the accused, the law does not infer his guilt, but leaves that question to the jury under a consideration of all the circumstances.

Where there were different counts in a bill of indictment, one charging a taking by the prisoner with violence, and another by seduction, and each of them also charging a conveying away, with the intents required by the Statute, the jury are not bound to find in which way the taking was had, but the verdict might be general, though there were other defective counts.

An indictment, in a case under our Statute, for the abduction of negroes, which charges that the defendant "by violence, feloniously took," is as good as if it had averred that the defendant "feloniously by violence took," &c.

In an indictment relating to the larceny or abduction of a slave, in describing him as the property of A. B., you may use indifferently the phrases, "then and there being the property or of the proper goods and chattels of A. B.," &c., or and "the property of A. B.," after laying the value, &c. of the slave.

In an indictment for stealing, &c. a slave, under our Statute, the words "with an intent to sell and dispose of the said slave" are sufficient.

The cases of *Hall*, 2 Hay. 105; *Davis*, 2 Law Rep. 291; *Jernigan*, N. C. Term Rep. 44; *Roper*, 3 Dev. 473; *Hardin*, 2 Dev. & Bat. 402; *Sparrow*, N. C. Term Rep. 93, and *Harvey*, 2 Dev. & Bat. 390, cited and approved.

Appeal from the Superior Court of Law of Sampson County, at the Fall Term, 1848, his Honor Judge PEARSON presiding.

The prisoner was indicted in eleven counts. The first charged, that he, "a certain male slave named Jim, of the value of ten dollars, and the property of Wm. D. Cobb, feloniously did steal, take, and carry away, contrary to the form of the statute" &c. Another count charged that he "did by seduction, feloniously take and carry away, a certain male slave named Jim, of the value of ten dollars, and the property of William D. Cobb, with an intention to sell or dispose of said slave Jim to another, contrary to the form," &c. Another count charged that he "did by violence feloniously take and carry away a certain male slave named Jim, of the value of ten dollars, and the property of William D. Cobb, with an intention to sell or dispose of said slave Jim to another, country," &c. The other eight counts alleged a taking of the negro by violence, or by seduction, respectively, with an intent to sell, or to appropriate to the prisoner's own use, without charging a conveying away; or alleged a conveying away by violence or by seduction, respectively, with an intent to sell or to appropriate, without charging a taking.

On the trial there was evidence, that on the 3rd day of April, 1848, the slave ran away from the owner, Cobb, who lived in Wayne County, about nine miles from Goldsboro', where the prisoner lived, and there was a depot of the Wilmington rail road: that about ten o'clock on the 23rd of April, (as stated in the exception,) the prisoner took passage to Wilmington and entered one of the cars, and two negro men also entered another car, in which negroes were generally transported, and after going about two miles the prisoner paid his own fare and that of the two negroes to Wilmington, and they proceeded to that place in the train: that about 10 o'clock of the 23rd of April, just after the cars arrived from Goldsboro', the prisoner, who was then unknown to the collector of the Port, took passage on board a steamer, belonging to the line, to

Charleston for himself and two negro men, and signed a manifest, describing them, in the name of "John Williamson:" that in due course the steamer would arrive at Charleston in time for a passenger to reach Hamburg on the rail road from Charleston to that place in the night of the 24th of April: and that on the 25th of April, 1848, the prisoner sold the negro Jim and another negro to one Trowbridge in Hamburg, the prisoner then calling himself "John Smith:" and that in October following, suspecting that the negroes had been improperly carried away, Trowbridge brought them back to Wayne, and Cobb claimed Jim as his and he was identified by others.

The prisoner called several witnesses to establish an *alibi*, and their evidence was left to the jury on the point.

The counsel on the part of the State contended: that if the jury should believe that the slave was in the possession of the prisoner twenty days after he ranaway, then, in the absence of evidence to rebut it, the law raised a presumption, that the prisoner had stolen him or feloniously taken him by violence or seduction.

The counsel for the prisoner, on the other hand, insisted, that, as the slave had runaway, the owner had lost his possession; and, that, as lost property, he could not be stolen, especially if the prisoner did not know the owner: and there was no evidence that he did know the owner, or even that the negro was a slave.

The prisoner's counsel further insisted, that the prisoner's conveying away the slave from this State and selling him would not authorise his conviction, but that he must also have taken him feloniously; and that there was no evidence from which the jury could infer that the slave was stolen or was taken by violence or seduction by the prisoner from the possession of the owner; and, even admitting a runaway slave to be in the possession of the owner for the purposes of this indictment, yet that, for aught in the evidence, the slave might have

been and probably was stolen or taken by some other person and delivered to the prisoner at Goldsboro': and that in such a case the prisoner could not be convicted, because the jury ought not to be allowed to guess how the fact was.

The Court instructed the jury, that to raise a presumption, that the possessor of stolen property had stolen it, the possession must be so recent after the theft, that the possessor could not have well come by it unless he had stolen it himself: and that, when the property was a negro man, who had runaway twenty days before the pessessor was first seen in possession, the time was too long for the Court to lay it down as a rule of law, that the possessor was to be presumed to have been the taker; and in such case it was to be passed on by the jury, as an open question of fact, upon the evidence.

The Court further instructed the jury, that, to justify a conviction of the prisoner, they must find both a taking of the slave by him from the owner and also a conveying away: for the two acts must concur in order to constitute the offence: that in this case the color of the negro raised a presumption to every one that he was a slave; and that stealing, or taking him by violence or seduction and conveying him away, with intent to sell or dispose of him, was a felony within the statute, though the negro was a runaway at the time and the prisoner did not know the owner: And that it was for the jury to determine upon the evidence, whether the prisoner did in fact steal or take the slave by violence or seduction and convey him with the intents charged: And that if the prisoner met with the slave while he was runaway and then took him by violence, or seduced him to go with him with the intent supposed, that would be a taking within the Act: And that, if the prisoner holding himself out as the owner or as the person having the charge of the negro, caused him to get into the cars and paid his fare and thereby enabled

him to pass along the rail road, that would be a conveying within the Act, although the prisoner was in one car and the negro in another. And the Court further instructed the jury, in reference to the manner in which the prisoner might have come into possession of the slave, that, if the prisoner had an accomplice, who stole or took the negro and brought him to the prisoner, and the prisoner's part was then to convey him away and sell him, there would not be a stealing by the prisoner, nor a taking within the statute. But that if the prisoner got some agent to carry messages to the slave, as a go between, and in that manner seduced the slave to come to him at Goldsborough, and get into the cars, the agent or go-between not having taken possession or any control over the slave, then that would be a taking by theprisoner: And that it was for the jury to decide from all the evidence, whether the prisoner himself took the slave or seduced him by messages sent by an agent to come to him and then took him, or whether the slave was taken by another person and delivered to the prisoner: and that if they were not satisfied either as to the taking of the slave by the prisoner in the modes mentioned or the conveying away by him, with the intents charged, they ought to find the prisoner not guilty. But if the jury should find such taking and conveying by the prisoner, inasmuch as there were counts in the indictment to meet the different aspects of the case, it was unnecessary for the jury to decide in which particular way it was effected.

The prisoner was convicted and after sentence he appealed to this Court.

Attorney General, for the State.

W. H. Haywood and *Meares*, for the prisoner.

RUFFIN, C. J. Under the instructions it is to be assumed, that the prisoner did not know the negro belonged to Cobb,

though we think it might well have been left to the jury, that he did. The residence of those persons within nine miles of each other in the same County, that of the prisoner being at a very public place, and the extreme probability that the prisoner, if before ignorant, would enquire and learn from the negro, who his owner was, and where he lived, in order to shape his course so as to avoid him, would seem to afford a fair presumption, that the prisoner had information in whom the property was. It is, however, now to be taken otherwise; and then the question is, whether a slave, under those circumstances, can be the subject of larceny. The Attorney General argued, indeed, that, if that be not so, yet under the statute the offence of taking by violence or seduction and conveying away, with the intents mentioned, is constituted without any reference to the condition of the slave, as being in the owner's actual possession or a runaway at the time. But the Act applies the words "steal" and "by violence or seduction take and carry away" to the same subject, namely, "a slave, the property of another;" and therefore if a runaway slave be not the property of another, so as to be the subject of stealing, we suppose he cannot be deemed his property, so as to be the subject of a taking by violence or seduction. This point has not been distinctly presented before, so as to be directly decided. But it is by no means new, and has been involved to some extent in other cases, so as to elicit opinions on it. It seems to us, when it was held in *Hall's* case, 2 Hay. 105, that a moral and intelligent being was the subject of larceny, because he was a slave, and in the cases of *Davis*, 2 Law Rep. 281, and of *Jernigan*, N. C. T. R. 44, that when the owner was known, a runaway slave was also the subject of larceny, that it was virtually decided, that every taking and conveying away a slave *causa lucri*, and *clam* and *secrete*, constitutes a larceny. Chief Justice TAYLOR strongly puts it in his report of the

argument of the Attorney General in *Jernigan's* case, that the reason given by Hawkins, why it is not larceny to take lost goods, namely, because the party is not much aggrieved, when nothing is taken but what he had lost before, does not apply to a runaway negro; because the owner is much aggrieved when, after his slave has runaway, his chance of regaining him is lessened, and perhaps destroyed by his asportation. He adds the forcible general remark, that whenever the principles of the criminal law are applied to a species of property unknown to the people, who instituted that law, it is absolutely necessary to consider the reason and spirit of the law, and so interpret it that slaves may be effectually protected; and that it was evident, that an adherence to the letter of the law, without regard to its spirit, would leave slave property unprotected, as the common law knew no such property. Upon reasoning of that kind, the Courts came to the resolutions in the cases cited; and the same reasoning reaches the present question. For, when it is enquired, whether a runaway slave can be stolen, if the owner be not known, it is implied that the taker knew the negro to be the slave of some one and that the taking was *causa lucri*. Admitting those points, the necessity for securing the rights of ownership in negroes imperatively requires, that such a taking of a runaway should be held to be larceny, and the impossibility of holding that a human being has any just similitude to an inanimate chattel that is lost, or to a brute that has strayed from its pasture, prevents an exception founded merely on the want of knowledge in the taker, who, in particular, was the owner of the slave. This subject was incidentally under consideration in *Roper's* case, 3 Dev. 473, and Chief Justice Henderson expressed himself pointedly in terms, which cover the whole ground. He said, that runaway slaves do not fall within the description of lost property; for, from their nature, being intelligent beings,

they are incapable of becoming estrays, in the legal meaning of the word, and in their runaway state they more closely resemble that class of lost property, than any other. The same idea pervades the statutes regulating the arrest and disposition of runaway negroes and the punishments for harboring them. For it is not only indictable to entice or persuade a slave to absent himself from the service of the owner—in which case a knowledge of the owner is implied—but also to harbor or maintain, under any pretence whatever, "*any* runaway slave," thus clearly placing the latter crime upon the state of slavery merely of the negro, without regard to the party's knowledge of the ownership. In an indictment or declaration for harboring a runaway, a *scienter* of the ownership is never laid, but only that the negro was a runaway slave, the property of some other person. For it is alike unlawful to harbor such a slave, whether the owner be known or not. Indeed, it is incorrect to say, that, for any rights or powers over the slave by one who takes him, a runaway is without a known owner. For the statutes require that the runaway shall, when taken up, be committed to jail, and if an owner do not appear in a prescribed time the slave is to be sold for public uses; so that the public, if no one else, may be regarded as the owner. At all events, the taker up can, under no possible circumstances, rightfully keep the possession of a runaway slave longer than is requisite to convey him to prison, or gain a property of the most special kind in him, but is at most entitled only to a reward for taking up. This is a remarkable feature in the condition of a runaway slave, which distinguishes it from that of lost goods or stray beasts; for in these last the finder gets the property until the owner appears, and therefore the idea of larceny by using the property in any manner is repelled. But that wholly fails in the case of a runaway slave, as the person, who takes him, must know that he has no in-

terest in the slave, and that, as against him, the public at all events has the right, and that it is his duty to provide for the proper disposition of the slave, and not convert him to his own use. Therefore, in such a case, the appropriation of the slave in the manner and under the circumstances, which usually indicate a felonious intention, is as criminal as if the slave had not been runaway. Hence we believe the understanding is almost universal, in every class of the community, that slaves cannot be reckoned among lost things, and that a runaway is, therefore, as much a subject of larceny, as any other slave; and the Court so holds.

It was further argued, that supposing the slave the subject of larceny or of a taking under the statute, there were other objections to the conviction. It was said first, that the Court ought not only to have refused the instruction asked for the State, but ought to have given an instruction, that a possession twenty days after the negro ran away was no evidence of a taking by the prisoner. The argument is fully answered by the fact, that no such instruction was requested, and the Court was not obliged *ex debito justitiae* to give it. But, in truth, it ought not to have been given. For the possession of a stolen thing is evidence, to some extent, against the possessor of a taking by him. Ordinarily, indeed, it is stronger or weaker in proportion to the period intervening between the stealing and the finding in the possession of the accused; and after the lapse of a considerable time before a possession is shown in the accused, the law infers not his guilt, but leaves that question to the jury under a consideration of all the circumstances. But in the case of a runaway slave, the possession can be called neither recent nor remote; because, although the negro may have been long runaway, it does not appear when he was taken by the prisoner, or any one else; and therefore the jury must judge from the attendant circumstan-

ces, coupled with a possession of the prisoner, and the fact, that a possession is shewn in no one else, when the slave was taken and by whom. In this case the negro was never seen from the time he ran away, until the night he was put into a car by the prisoner for transportation to a distant place, to which he was carried with all speed by the prisoner, who there under a false name sold him. Considering the subject to be an intelligent being, from whom such information might be obtained as would lead to the obtaining of competent evidence of a prisoner's taking by some one else, if the fact were so, and that no such evidence is produced, nor likelihood of the fact shewn, and considering the manner in which the prisoner proceeded on his journey and in the sale, this is not only not a case in which there was no evidence of a taking by the prisoner, but it is one in which there is no evidence of a taking by any other person and a high probability of a taking by the prisoner. In all cases of presumption from possession and time much often depends on other and minute circumstances. We think, therefore, that the position taken at the bar cannot be maintained, that there could not be a conviction without distinct evidence of the taking by the prisoner himself, inasmuch as the taking might have been by some one, who delivered the negro to the prisoner. If that were true, it would be impossible to convict any person of stealing a runaway, but upon the evidence of an accomplice; for, being moral agents, they may be seduced and got into possession with such privacy, as to render it impracticable otherwise to establish directly the exact time or the precise means of effecting it. The Court went far enough in "allowing the jury to guess," without any evidence to the point, that the negro might have been delivered to the prisoner, and so was not taken by him; and we think the complaint on the part of the prisoner is entirely unfounded, that the Court submitted to

the jury the consideration, whether the prisoner might not have prevailed on the negro to come to him by messages through an agent. For, although it be true, that there was no proof to that point, and therefore it was not strictly proper to leave it to the jury, yet the prisoner has no right to complain of it, since he was the cause of it. For there was as little proof or probability, that the prisoner, as he contended, had received the negro from another person; and therefore, when the Court, at the instance of the prisoner, left the enquiry upon this last point to the jury, it was not improper to enable them to distinguish between the case of a delivery of the negro to the prisoner by one who had taken and acquired full dominion over him, and that, in which the prisoner was the first taker, though enabled to become so by means of messages through a person—another slave, for example—who merely delivered him, without aiming at or acquiring any dominion over the slave for himself. The position laid down to the jury was correct in point of law, according to *Hardin's* case, 2 Dev. & Bat. 407, and the prisoner had sustained no injury from it, though there was no evidence to which it was applicable; for it was at his own instance that any thing was said on the subject.

It was also insisted, that there was error in telling the jury that it was not necessary for them to decide in which particular way the taking by the prisoner was effected, inasmuch as some of the counts are defective. For, it is argued, the case is not within the rule, that there may be judgment on an indictment containing defective counts, if there be a good one; because that proceeds on the ground, that there was evidence to authorise a conviction upon each and all of the counts, whereas here the jury were told, it is said, that they might convict upon all, if they thought the prisoner guilty upon any one. If that be true, there ought to be a *venire de novo*, certainly; for

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unquestionably the eight counts are bad, in which a taking without a conveying, and a conveying without a taking, are respectively charged. But it is clear, that the supposed error was not committed; for the Court explicitly put those counts out of the case, in the very beginning of the charge, by telling the jury, that the acts of taking and conveying must concur to authorise a conviction. The meaning evidently was, and the jury could not have mistaken it, that if they found a taking of the negro by violence or by seduction, and also a conveying away, by the prisoner, with the requisite intents, then it was not material, that they should find in which of the modes the taking was effected, but the verdict might be general. The instruction therefore plainly applied only to the counts which charged the stealing, or the taking by seduction and conveying away, or the taking by violence and conveying away; all of which are good. It assumed, that the jury should be satisfied, that the prisoner was guilty in one of the modes well charged; and, if so, it was manifestly of no consequence, whether the conviction was on any one or all of those counts, since the offences were of the same grade and the punishment the same. The instruction might relieve the jury of some trouble in their investigation, but could work no prejudice to the prisoner.

Some objections were taken to the insufficiency of the evidence of the identity of the slave of Cobb with the negro carried on the road, and also the apparent discrepancy in the statements as to the times of leaving Goldsborough and Wilmington. But they were points arising upon the evidence and were proper for the jury and not for this Court.

A motion has also been made here in arrest of judgment, on several grounds. One of them is, that the indictment does not apply the term "feloniously" to the violence and seduction, as well as to the taking. But it

clearly does, for the expression, that one "by violence feloniously took." is the same as that he "feloniously by violence took," it being impossible, that the thing can be taken feloniously by violence, unless the violence—the means of taking—be felonious.

Another is, that it is not directly averred, that the negro was not the property of Cobb, as by the words, "then and there being the property, or of the proper goods and chattels of," &c. but only adds the averment after laying the value, "and the property of," &c. But both forms of expression have the same meaning, and they are used indifferently. This indictment follows in this respect that in *Sparrow's* case, N. C. T. R. 93; and that was held good on a motion in arrest.

A third ground is, that the indictment is uncertain and repugnant in charging an intent to "sell *and* dispose of" the slave, as a disposition may be by other means than that of a sale. But in that respect the indictment is sustained by the precedent in *Harvey's* case, 2 Dev. & Bat. 390, and the opinion there given on the very point.

Upon the whole, then, the Court sees no error in the record. Indeed, we have had no difficulty whatever, but on the question, whether a runaway slave be the subject of larceny, or within the Act of 1779. If the former, he certainly is the latter. But we own, that, were it *res integra*, we should hesitate to hold, that the common law could recognise such a thing as the larceny of a man, and perhaps feel bound to leave it to the Legislature to make a fit provision for the case. But for upwards of half a century it has been held by the highest tribunals to be law here, and has been tolerated and affirmed by the legislature as a salutary security of a very important portion of the property of the citizen; and therefore the Court now feels bound to follow up the principle thus established.

* Per Curiam. Certificate ordered to the Court below.

DEN ON DEMISE OF KINCHEN POWELL & AL. vs. WILLIAM T. BAUGHAM.

Where an execution from a justice of the peace has been levied on land and returned to the County Court, where judgment is rendered for the plaintiff, he may either have an order of sale, under which he can only sell the land levied on, or he may take an execution as in other cases of judgments.

A special *fieri facias* may be added to a *venditioni exponas*, whenever a *fi. fa.* itself may be sued out.

The cases of *Amyett* v. *Backhouse*, 3 Murp. 63, *Burke* v. *Elliott*, 4 Ire. 355, and *Borden* v. *Smith*, 3 Dev. & Bat. 34, cited and approved.

Appeal from the Superior Court of Law of Northampton County, at the Fall Term, 1848, his Honor Judge BAILEY presiding.

Both parties claim title to the premises under Morris Baugham, who conveyed them to Jesse Blanchard, and he conveyed to the lessor of the plaintiff. On the part of the defendant, it was alleged, that the deed to Blanchard was made in fraud of Morris Baugham's creditors, and the defendant set up a title under a sale and conveyance to him by the sheriff. In support of his title, the defendant gave in evidence the record of a judgment before a justice of the peace against Baugham, and a *fieri facias* thereon levied on the premises, and returned to the County Court, and, after notice to the debtor, a judgment of the County Court affirming that of the justice of the peace for the debt and costs, and a *venditioni exponas* thereon for the sale of the premises levied on.

On that evidence the counsel for the plaintiff objected, that the writ of *venditioni exponas* was inoperative, because the County Court had made no order of sale or any special award of the writ; and of that opinion was the

Court and directed the jury to find for the plaintiff. There was a verdict accordingly, and judgment thereon; and the defendant appealed.

B. F. Moore, for the plaintiffs.
Whitaker and *W. N. H. Smith*, for the defendant.

RUFFIN, C. J. Under the Act of 1794, a *venditioni exponas* was the only execution, that could be issued from the County Court upon a levy of a justice's execution on land; and that could only be had by the special order of the Court. If satisfaction was not obtained by the sale of the land, the plaintiff was obliged to proceed again before the justice of the peace. That was often a serious inconvenience, and to remedy it, the Act of 1822 was passed to require the Court, on the application of the plaintiff, to enter a judgment there for the debt and costs. It is then added, that, "if by the sale of the land levied on, a sufficient sum shall not be produced to satisfy the judgment, the plaintiff may sue out execution from the Court for the residue in the same way as if the judgment had been originally rendered by the Court." The opinion held in the Superior Court was, that, since that Act, in addition to a judgment for the debt and costs, there must still be a special order of sale to entitle the plaintiff to a *venditioni exponas*. This Court entertains an opinion to the contrary. No doubt the creditor may still limit his motion to an order of sale; and, if so, he can have nothing but the *venditioni exponas*. But if he take judgment in Court for his debt and costs, then, *ex vi termini*, he may have any execution, which under like circumstance he would be entitled to upon any judgment in Court, unless the Act restrains him in some respect; which, we think, is clearly not the case. What, then, is the state of such a case? It is, that the plaintiff has a general judgment for his debt, with a lien on the land levied on for its sat-

isfaction. The Legislature did not mean to discharge the lien by reason that the creditor took a general judgment instead of an order of sale; and it was, no doubt, to show that such was not the meaning, that the words were added, respecting the sale of the land levied on. It is precisely like the case of a judgment in original attachment; upon which the words of the Act of 1777 are, that "if the judgment shall not be satified by the goods attached, the plaintiff may have execution for the residue;" and it has always been held that upon such a judgment the plaintiff might either have a *venditioni exponas* or a *fieri facias*, though if he take the latter writ the property attached is discharged. *Amyett* v. *Backhouse*, 3 Mur. 63. It was to prevent that inference from the judgment's being general in the County Court, that the particular provision was inserted in the Act of 1822, which has been quoted. But, without such special words, the just construction of the Act would have led to the same result. For, the Act is remedial and therefore is to be favourably interpreted; and why should not the creditor be entitled upon such a judgment to any execution, which he would be entitled to upon any other judgment, when there is a lien on particular property? The record shews the debt, and the levy on the land, just as they appear when the levy is returned by the sheriff on a *fieri facias*; and therefore a *venditioni exponas* may be sued by the party, according to the course of the Court, without any special award of it in the one case as well as in the other. Indeed, the case is exactly that of a judgment in attachment. In *Burke* v. *Elliot*, 4 Ire. 355, the judgment and execution were like those now before us, and the Court said, that, upon a judgment rendered in the County Court for the debt, the creditor, at his election, could have execution against the land levied on, or against the person, or property generally, of the debtor. In *Borden* v. *Smith*, 3 Dev. & Bat. 34, it was held, that a *venditioni exponas* might issue up-

on such a judgment. It is mentioned further in that case, as if there were some uncertainty about it, that a *fieri facias* clause might be inserted in the *venditioni exponas*. Why any hesitation should have been felt on that point we are now at some loss to say; for a special *fieri facias* may be added to a *venditioni exponas*, whenever a *fieri facias* itself may be sued out. That upon the judgment in the County Court the plaintiff may immediately have a *venditioni exponas*, seems necessarily to result alike from the nature of the case and the particular terms of the Act of 1822.

PER CURIAM. Judgment reversed and *venire de novo*.

JOHN C. RANKIN & AL. vs. THANKFUL RANKIN & AL.

In a probate of nuncupative wills every requisition of the Statute ought to be faithfully observed; and especially the probate will not be good if the next of kin are not cited.

Appeal from the Superior Court of Law of Guilford County, at the Spring Term, 1848, his Honor Judge PEARSON presiding.

This is an application to call in the probate of a nuncupative will of William Rankin, who died in September, 1820, leaving a widow, who is one of the defendants, and two daughters, who were infants. It was on the 22nd of September, reduced to writing in this form: "The nuncupative will of William Rankin, deceased. It was his

will and request that the old plantation be sold and the old wagon and still and all the stock that his wife could spare, to pay his debts; and the remainder of the property to be at his wife's disposal; and for her to get one of his or her friends to assist her, or whom she pleases. He mentioned that he was not able to do it himself. William Rankin related these words on the 7th day of September, 1829, and died on the 17th of the same month. Teste—Samuel E. Donnell, David Wilson."

At November Term of the County Court of 1829, probate was taken thereof in the following form: "This nuncupative will of William Rankin, deceased, was duly proved in open Court by the oaths of Samuel Donnell and David Wilson, the subscribing witnesses thereto; and it is ordered to be recorded." There was no citation to the children, nor any guardian appointed to defend their interests. At the same time administration with the will annexed was, at the request of the widow, granted to her and John Rankin, a brother of the deceased; and after the payment of the debts, Mrs. Rankin continued in possession of the estate, consisting of eight slaves, stock, household furniture, and other things, claiming them as her own under her husband's will. Her daughters likewise lived with her until their marriages, which took place while they were respectively under age; that is to say, that of one of them, Hannah, to John C. Rankin, in December, 1833, and that of the other, Nancy, to Thomas Rankin, in December, 1840. Hannah had four children and died in May 1845; and Nancy had two children and died in April 1844. After the respective marriages, Mrs. Rankin gave to each of her daughters some slaves by parol and put them into the possession of their husbands. But after the deaths of the daughters differences took place between that lady and her sons-in-law, and she brought actions of detinue against them and recovered the negroes. They then administered on the estates of

their respective wives, and instituted the present proceeding in August, 1846.

The allegation impeaches the probate of the will, upon the ground, that there was no process to call in the children to contest it, nor were they otherwise parties to the proceeding or privy thereto, and also because it does not appear in the probate, that the will was made under such circumstances as the law requires to make it valid, and, particularly, that the witnesses were specially required to bear witness thereto by the testator himself. Furthermore, the allegation impeaches the will itself, because the witnesses were not in fact thus specially required to bear witness to the will by the testator.

Mrs. Rankin and John Rankin put in a responsive allegation, and therein admit, that the probate took place without process sued out to bring in the children or their being otherwise actually before the Court. But Mrs. Rankin states in fact the daughter Hannah, then 14 years old, was present when the will was made and knew its provisions; and that she and Nancy, then 7 or 8 years old, knew, when she went to Court to have the will proved, and were immediately informed that it had been proved, and that they both acquiesced in it during their lives, and, particularly that Hannah did, notwithstanding repeated efforts of her husband to render her dissatisfied, and notwithstanding the peace of her life was disturbed by his importunities to her to fall out with her mother and set up a claim to the property given to her by the will. Mrs. Rankin states, that the will was made by her husband at his own house, in his last sickness, and in the presence of herself, her daughter Hannah, David Wilson, Samuel E. Donnell, and the wife of Donnell; and that the testator called all of them to his bed side and said, "I want you all to take notice of what I say, and bear witness that this is my will." And both she and John Rankin state, that the witnesses Donnell and Wilson, both,

deposed to the Court, when the will was offered for probate, that the deceased did thus call on them and the other persons to take notice as above set forth. Mrs. Rankin furthermore states, that the present applicants after their intermarriages with her daughters saw a copy of the will and probate frequently at her house, and were fully informed in respect thereof; and that, although they repeatedly applied to her, she constantly refused to make them conveyances for any of the negroes, and that they submitted to such refusals during the lives of their wives and until December 1845: and that then they again applied to her for a title to the negroes, when she informed them, that she would not make any, but intended to let them enjoy the slaves during their lives, and then to give them to her grand-children—whereupon they threatened to have the will set aside, and she brought suit for the negroes.

In support of the allegation, David Wilson, one of the subscribing witnesses, has been examined, and he deposes that the will was made in the presence of Donnell, himself, his wife, and Mrs. Rankin, and was correctly reduced to writing; but that he has no recollection, that either he or Donnell or any other person was called on by the testator to remember or bear witness to what he said; and that he feels confident, that they were not thus called on, because he is sure, that he put into writing all the testator did say; and that neither he nor Donnell was examined or made any statement to the Court on that point.

On the contrary John Rankin deposes, that, being called on by his sister-in-law to assist her in the management of the estate, he was led to enquire into the circumstances under which the will was made, and that he was informed by Wilson and Donnell, that they were called on by William Rankin to bear witness that, that was his will, which was by them afterwards reduced to writing: That

he employed respectable counsel to have the will proved properly; and that he was present in Court upon the occasion and both Donnell and Wilson then swore that the testator disposed of his property in the manner in which they wrote the will down and that they were both called on to bear witness to it. He states, further, that Donnell is dead.

Both of these witnesses are proved, by several respectable persons, to have very good characters; but most of the witnesses say, that Mr. Rankin was so deaf in 1829, and ever since, that his hearing was very indistinct.

The cause was brought by appeal to the Superior Court, and there the probate was set aside, and an appeal then taken to this Court.

Kerr and *Iredell*, for the plaintiffs.
Morehead, for the defendants.

RUFFIN, C. J. Nuncupative wills were found to give rise to so many frauds and perjuries, that it was necessary to guard them by many requisites in respect to their execution and their probate. *Cole* v. *Woodnunt*, 4 Ves. 196, note, 2 Bl. Com. 501. To render the protection safe against those evils, the Court ought faithfully to observe every one of the provisions of the Statute. As one of them, and not the least important, the Act prohibts probate of a nuncupative will "until process has been first issued to call in the widow, or next of kin, or both, if conveniently to be found, to contest the same if they think proper," in order to prevent surprise on those interested in the estate. It was not intended, that there should be a probate of such a will in common form, when one in solemn form could be had, nor that the privity of the next of kin should be inferred from supposed opportunities of knowledge, or established by parol proof, as in some other instances it may be. For, in the former case, there might

be surprise; and in the latter perjury; and the danger of each was so obvious, that the Legislature deemed it politic to exclude the opportunities of committing them. Here the next of kin might have been conveniently found, being within the jurisdiction, and, indeed, resident with the party offering the will. It is true, they were infants, and, if brought in by process, could not have conducted the enquiries on which their rights depended. But that did not excuse the other party from bringing them in, because then it would have been the duty of the Court, thus informed of the state of the next of kin, to appoint a guardian to defend for them. This case, itself, shews the importance that this requisite of the Act should have been attended to at the proper time; for, if it had, the conflict would have been avoided, which now exists between the witnesses upon the essential point, whether the supposed testator gave the requisite evidence, that his words were not uttered in loose discourse but *animo testandi*, by calling on persons to bear witness to that intention. At this day there can be no certainty, it seems, on that point, as the examination at the probate was *ore tenus*, and one of the witnesses, a respectable man, deposes that there was no such calling on any body, and that neither he nor the other witness deposed or was examined to it at the probate; while another person, equally respectable, states, although he cannot prove that the deceased did call in that manner on the witnesses, that yet both of them swore on that occasion, that he did. Thus it is seen, that the very evil has in this instance been produced, against which the wholesome enactment in the statute was directed. It is said, indeed, that the probate imports that this evidence was given, as it states that the will was "duly proved;" which could not be without the evidence; and that it gives also the greater credit to the witness Rankin. But there is very little weight to be given to that expression in an *ex parte* pro-

bate, and, especially, when it is clear that in one respect, at least, it was not duly proved, inasmuch as the next of kin were not called in, nor any enquiry made for them upon process. Besides, Wilson's statement is much corroborated by the omission of any such words in the supposed will, inasmuch as he states positively, that every thing was reduced to writing, which the party deceased said on the subject. Whether regard be had, then, to the form of the proceeding in the probate cause, or to the sufficiency of the instrument, as constituting a will, the probate was improperly passed.

If acquiescence could supply in such a case the intrinsic defect of the probate from the omission to call in the next of kin, we think there is nothing to establish such an acquiescence as can bar the children from demanding a reprobate. There is no statute of limitations applicable to the case. The bar, if any, must arise solely from the presumption of abandonment, or of satisfaction of the claims of the parties as next of kin. It is clear, there is no satisfaction. None is pretended. As to the abandonment, the mother says only, that the husbands, as well as her daughters, knew of the will and probate. But it is not established, that they were properly aware of their rights and intended to waive them. On the contrary, the daughters were never *sui juris*, having been infants when they married and under coverture at their deaths; and it is certain, that the husbands were not satisfied and did not intend to acquiesce finally in what had been done, but expressed themselves otherwise from time to time, to the extent, even, of domestic disquiet, according to the allegation of the mother herself. They intended in some way to assert the right of their wives to shares of the negroes, if the mother would not make something like a fair distribution of herself; and, as soon as she finally refused, they instituted the present suit. As administrators of their wives, they are entitled to have the probate re-

voked and leave the other party to propound the instrument again, if she shall still think proper to set it up as a will. The sentence in the Superior Court is affirmed with costs; and this will be certified to that Court, in order that the parties may make up an issue, if they think proper, or that such other steps shall be taken for the administration of the estate as the law requires.

PER CURIAM. Judgment accordingly.

KENION T. WEST & AL. *vs* JOHN TILGHMAN.

Where an owner of a slave stands by and sees the slave sold by another, having no title, and makes no objection, yet he is not thereby estopped from asserting his legal title.

The title to a slave can only be conveyed, according to the laws of this State, by a sale in writing, except when delivery accompanies the sale, or by a gift evidenced by a written instrument, the written instrument in each case to be attested by a subscribing witness and proved and recorded.

Wherever a suit will survive to a wife she may be joined with her husband in the action.

The case of *Bird* v. *Beaton*, 2 Dev. 180, overruled. The cases of *Governor* v. *Freeman*, 4 Dev. 474, and *Lentz* v. *Chambers*, 5 Ire. 599, cited and approved.

Appeal from the Superior Court of Law of Craven County, at the Fall Term, 1848, his Honor Judge SETTLE presiding.

The case is as follows: Joseph Watson, by his will, gave his son, Jno. A. B. Watson, after the death of his wife, a negro slave named Reuben, and a negro woman, named Sylva. By a subsequent clause, he directs, that

at her death, all the property he had lent her, should be equally divided between his son, John and his daughters, Teresa and Susan, with survivor-ship, upon either dying without leaving issue. John died without issue, after his mother's death, having by deed, conveyed to a Trustee, for the payment of his debts, all his property, including the negroes Reuben and Sylva. Among the debts secured, was one to West, the plaintiff, who had married Teresa, and some to Kilpatrick, who had married Susan. The Trustee took the property into his possession, after the death of John A. Watson, which took place in 1835, hired out the negroes in the month of until the succeeding Term of the County Court of Lenoir, when he sold them at public auction, and the defendant purchased the slave Reuben, and Kilpatrick, the plaintiff, the negro Sylva. But West and Kilpatrick knew that the slaves were conveyed in trust, and knew of the sale; both were on the ground when it commenced, and the latter continued there during the whole time, and each received a portion of the money raised by the sale, as secured creditors.

His Honor charged the jury, that if they collected from the evidence, that the plaintiffs knew of the execution of the deed of Trust, the hiring of the boy, Reuben, by the Trustee, for one month, and of his intention to sell him, and that they attended at the time and place of sale, and that one of the plaintiffs, Kilpatrick, purchased the negro Sylva, conveyed in the same deed of trust with Reuben and subject to the same claim the plaintiff now set up to him, and that if West, the plaintiff left the place of sale without forbidding the sale or setting up any title to the slave Reuben, and that the plaintiffs, West and Kilpatrick, by their act and conduct, induced the defendant and others to believe, that the title of the Trustee to the slave Reuben was undisputed, and if they further believed, that the plaintiffs received, each of them, from the

Trustee a portion of the money arising from the sale of Reuben, they were not entitled to recover.

Verdict for the defendant and appeal to the Supreme Court.

No counsel for the plaintiffs.

J. H. Bryan, for the defendant.

NASH, J. The instruction given to the jury, in substance is, if the facts enumerated did exist, in *law*, the plaintiffs could not recover. This could not be, we think, unless *they* had transferred the slave to some other person. It is admitted that the legal title to the slave had been in the plaintiffs; have they, in any mode known to the law, parted with it? By the law of this State, all sales of slaves must be in writing, except where delivery accompanies the sale, or it is void, and all gifts must be evidenced by a bill of sale. In neither of these modes, have the plaintiffs parted with their title. But it is alleged, that the circumstances, proved in the case, amount either to an estoppel, or to a conveyance by them. We think neither conclusion is correct. The fact, that a person was present, when property, claimed by him was sold, without making known his title, amounted to an estoppel, was decided in *Bird* v. *Benton*, 2 Dev. 180. That case, however, has been over-ruled by those of *Governor* v. *Freeman*, 4 Dev. 474, and *Lentz* v. *Chambers*, 5 Ire. 587. The principles governing this case are laid down by the Court in the case of *Jones* v. *Sasser*, 1 Dev. & Bat. 462. There it was contended, that the plaintiff, by his concealment and *misrepresentations* of the ownership of the property, was estopped and concluded from setting up any claim to the injury of those, whom he had thus imposed on and deceived. It was ruled, that even misrepresentation, coupled with concealment, was no estoppel, and that there was no such rule of *law*, which

precluded the plaintiff from showing his title. In this case there is no pretence, that the plaintiffs were guilty of either concealment or misrepresentation—there is no evidence that they knew of their title. For, although it is under the will of Joseph Watson, that they claimed, yet it was a matter of construction; and that they were ignorant of it, is strongly implied by one of the acts, upon which the defendant relies, to-wit: The purchase by Kilpatrick of the negro Sylva, to whom their title was just as good as that to Reuben, both being included in the deed of trust. It is difficult to imagine a motive, in making the purchase of her consistent with a knowledge of their title, unless upon the ground of fraud, which is not pretended. But even if they did know it, it would not alter the case in this Court. The case of *Susser* further decides, that to hold, that the representations or misrepresentations of a party could transfer the title to another person, would be to violate the positive law of the State. That case is supported by that of *Pickard* v. *Sears and Barratt*, 33, En. C. L. R. 117. That was an action of trover for machinery. The property had belonged to one Metcalf, who had mortgaged it to the plaintiff, to secure a debt due to him. Metcalf was permitted to retain the possession, and use the machinery. While so in his possession, it was levied on to satisfy an execution against him, and at the sale, the defendant purchased. It was proved on the trial at *nisi prius* before Lord Denman, that the plaintiff, before the sale, had frequent conversations with the attorney of the defendants, concerning the machinery, and advised with him, as to the best mode of *raising money* on it to pay off the execution, and that he knew of the intention to sell, but at no time made known the fact of the mortgage. His Lordship refused to leave it to the jury, to say, whether the plaintiff had not concurred in the sale, on the ground that there was no evidence of such concurrence. In delivering the opinion

of the King's Bench upon a rule for a new trial, he says that the plaintiff, having a "good title to the machinery, could not be divested of it, but by a sale or gift." He concludes, as to the ground, upon which a new trial was granted, as follows, "We think his (the plaintiff's) conduct, in the standing by and giving a kind of "sanction to the proceedings under the execution, was a fact of such a nature, that the opinion of the jury ought to have been taken, whether he had not, in point of fact, ceased to be owner." Not that the facts set forth, themselves, deprived the plaintiff of his title, but whether they were not of such a nature, as to satisfy them, that, before the sale, he had, in fact, divested himself of the title to the property, in one of the ways, known to the law, and previously stated by him, to wit: by gift or sale.

We are of opinion that the Judge below erred in stating to the jury, that if they believed the circumstances existed, as enumerated by him, the plaintiffs could not recover. Those circumstances might be some slight evidence of the fact, that, before the sale, the plaintiffs had, by the means known to the law, transferred their title to Reuben to some other person, and, thereby, ceased to be the owners. Sitting in a Court of Law, we cannot enter into questions of Equity or hardship. These are considerations, which belong to another and distinct tribunal *Sasser* v. *Jones*, 3. Ire. Eq. 19. We think the action was properly brought in the names of the wives as well as in those of the husbands. Wherever the suit will survive to the wife, she may be joined in the action. *Dunstan* v. *Burweld*, 1 Wil. 224.

Per Curiam. Judgment reversed and a *venire de novo* awarded.

AUGUSTINE CULLY *vs.* LOVICK JONES & AL.

Where on petition of an executor, in pursuance of the directions of his testatrix, an order was passed in 1805 by the County Court, "that the said executor have leave to emancipate his said slave, he first giving bond and security as required by law," and the bond was not given till 1816, and ever since that order, until the year 1846, the said slave and her children had been permitted to enjoy all the rights of free persons of color; *Held*, that neither the executor, whose duty it was to give the bond, nor any person claiming under or through him can take advantage of that omission, much less a mere wrong-doer, after the lapse of so many years.

Appeal from the Superior Court of Law of Craven County, at the Fall Term, 1848, his Honor Judge SETTLE presiding.

This was an action of trespass *vi et armis*, for false imprisonment. The defendant pleaded that the plaintiff was a slave, upon which issue was joined. By the will of Jane Thompson, to whom Phebe, the mother of the plaintiff, belonged, Reuben Jones, her executor, "was directed to obtain the freedom of Phebe, if practicable, on account of her meritorious services." In pursuance thereof, Jones filed a petition in the County Court of Carteret. Whereupon it was ordered by the Court, at November term, 1846, "that the said Jones have license to liberate the slave Phebe, he first giving bond and security as required by law." From and after that date Phebe was permitted by said Jones to act as a free person, and she and her children have ever since, up to a short time before this action was brought in 1846, been treated as free persons. Jones neglected to give the bond as required until until the year 1816, when at the August term of said Court, it was ordered "that the said Jones file his bond for the emancipation of the negro woman

Phebe, pursuant to the grant of this Court at November term 1806, with James T. Jones as security;" which was accordingly done.

The plaintiff, Augustine, was a child of Phebe, born in the year 1808, and always acted and was treated as a free person, until just before the commencement of this action, when she was seized by the defendant and claimed as a slave. Judgment for the plaintiff and appeal by the defendants.

J. H. Bryan and *J. W. Bryan*, for the plaintiff.
No counsel for the defendant.

Pearson J. It might be urged, with much force, that the bond given in 1816, by order of the Court, had relation back, so as to make effectual the act of emancipation under the order of 1806, and that the plaintiff, although born before the bond was executed, was free by the force and effect of the emancipation of her mother. But, admiting that the sovereign, if such was its pleasure, might insist that the act of emancipation was not valid, because of the omission to give the bond, we are clearly of opinion, that Reuben Jones, the executor, whose duty it was to give the bond, and no one claiming under or through him, can take advantage of that omission; much less can a mere wrong doer, after the lapse of so many years.—More than forty years have allowed to pass from the act of emancipation and the birth of the plaintiff, before any claim was made to hold her as a slave; during all which time, she passed as a free person and was so treated and considered by the community, in which she lived. After so long an acquiescence, almost any thing will be presumed, in order to give effect to the act of emancipation.

There was no error in the Court below.

Per Curiam. Judgment affirmed.

WILLIAM A. WHITFIELD *vs.* WILLIAM B. HURST.

The propounder of a will of a married woman should properly file allegations in writing and on oath, setting forth the instrument or facts relied on, so as to put on the record such a case as would shew that the paper propounded might be the will of the party deceased, notwithstanding her coverture.

In like manner the party contesting should put in his allegations in writing, pleading a former sentence as a bar to any further litigation, and, of course, to ordering another issue, or denying the existence of any alleged agreement or of any right in the wife to bequeathe.

And these are preliminary matters proper for the Court to decide, and not matters for the jury.

A Court of Probate cannot construe a marriage settlement, so as to determine whether it vested a separate estate in the wife or not.

But where a marriage agreement gives a color to the act of the wife in making a will, that is sufficient to induce the Court of probate to admit the paper, leaving it to the Court of Equity ultimately to construe and enforce the articles and compel the execution of the will, if made, in the view of that Court, under a sufficient authority, or by virtue of a sufficient estate in the wife.

After an issue of *devisavit vel non* is submitted to a jury, there cannot be a definitive sentence upon a paper offered as a will, but upon the verdict of the jury, unless the issue is itself set aside.

After such an issue made up, either party has a right to insist on a verdict.

The case of *St. John's Lodge* v. *Callender*, 4 Ire. 335, cited and approved.

Appeal from the Superior Court of Law of Wayne County, at the Spring Term, 1847, his Honor Judge PEARSON presiding.

This is a proceeding to obtain the probate of a paper as the testament of Sarah B. Hurst, a married woman; which is opposed by the administrator of the husband, who died since the death of his wife.

Just before the marriage the intended husband executed to the lady, then Sarah B. Whitfield and a widow, an agreement in the following words:

"Know all men that we, John B. Hurst and Sarah B. Whitfield of the County of Wayne, have this 6th day of April 1826, made and entered into the following agreement: to wit: That we have consented to wed in holy wedlock, and by the laws of North Carolina in such case the right of property is changed: Now, know ye, that we, the said John B. Hurst and Sarah B. Whitfield, before entering into the bonds of matrimony have agreed that all the right, titles, and interest of the property now belonging to the said Sarah B. Whitfield shall not be changed or so altered as to become subject to the control of the said John B. Hurst, as respects being subject to the payment of any debt of the said John B. Hurst, which he may now owe or may hereafter contract, or be subject, or be liable to be sold by the said John B. Hurst. Nevertheless the said John B. Hurst has full power and authority to use the property of the said Sarah B. Whitfield at all times in such manner, as may be most conducive to the benefit of the said Sarah B. Whitfield, and a reasonable portion of the products of the property, as aforesaid, shall be made use of by the said John B. Hurst for the better support of the said Sarah B. Whitfield."

The instrument was signed and sealed by John B. Hurst alone, and delivered, and the marriage took place, and the parties co-habited until some time in the year 1840, when the wife died. A script was then found, which was altogether in the hand writing of Mrs. Hurst, bearing date July 24th 1837, purporting to be her will and to be made under the powers and rights vested in her by the marriage contract aforesaid, wherein she gave eleven negroes to her son William A. Whitfield and the residue of her property to her husband, and appointed her husband and another person the executors. In 1840, the script was crrried into the County Court by William A. Whitfield, the legatee, and the executors were called on to take probate thereof; but they declined, and then

William A. Whitfield propounded the paper as his mother's will, and its validity was contested by John B. Hurst, and the usual issue made up between them. It came on for trial in February 1841 before the jury, when the counsel for Hurst "objected to the instrument on the ground, that it was made by a *feme covert*, who had no authority to execute it: and the plaintiff offered to prove by witnesses that the instrument was executed by the said Sarah B. Hurst, but the Court, for the reasons assigned by the defendant's counsel, refused to admit the same, whereupon the plaintiff submitted to a non-suit.

In November, 1844, the party, William A. Whitfield, re-propounded the paper in the County Court, and it was then contested by William B. Hurst, the administrator of John B. Hurst, and an issue of *devisavit vel non* made up. Upon the trial there was a verdict in favor of the paper, and Hurst appealed to the Superior Court. Upon the trial in the latter Court, it was insisted on the part of Hurst, that the proceedings in the County Court, when the paper was first propounded, were conclusive against it, and he moved the Court so to pronounce. But the Court was of a contrary opinion, and refused the motion. It was further insisted on the part of Hurst, that the paper was void as a will, because the supposed testatrix was a married woman and had not capacity to make a will, unless by virtue of some agreement or consent of her husband, and that the contract of April 6th, 1826, aforesaid, did not enable her to make one. But the Court was of opinion, that the agreement gave Mrs. Hurst the separate use of the property mentioned, and that she had the right to dispose of the beneficial interest in the property by a will, or a writing in the nature of a will, without any further assent or license of her husband. Thereupon evidence was given of the execution of the instrument by Sarah B. Hurst as her will, and the jury gave

a verdict in accordance therewith, and from the judgment in favor of the will Hurst appealed.

Mordecai and *J. H. Bryan*, for the plaintiff.
Strange and *Husted*, for the defendant.

Ruffin, C. J. Although the points were not presented in the most formal and convenient method in the Superior Court, yet the opinions given on them were, we think, substantially correct, and therefore the judgment must be affirmed. Proceedings of this kind have been so rare here, that no particulars have been settled for them. The statute says, indeed, that the validity of every contested will shall be tried by a jury, upon an issue made up under the direction of the Court. But it is manifest that such questions, as those made in this case, do not properly enter into the issue of *devisavit vel non*. For, it is not to be referred to a jury, whether, for example, the Court of Probate had before pronounced for or against this paper as a will, depending, as it does, upon matter of record; or whether the wife had such a separate property as gave her, as an incident to it, the right of disposition by will, or was otherwise licensed by her husband, so as to confer on her a testable capacity. Those are purely questions of law, not fit for a jury. They would seem properly to stand for decision by the Court, as a preliminary step to making up the issue under the statute; so as to limit the enquiry before the jury to the *factum*, the mental capacity, or the free exercise of the will by the party. Such, no doubt, would be the course, were the proceedings in probate Courts here in no part *ore tenus*, but by special allegations in writing. Then the propounder, by reason that the general rule of law denies to a *feme covert* the capacity to make a will, would be obliged to plead upon oath the instrument or facts relied on to import the capacity, so as to put on the record such

a case as would show, that the paper propounded might be the will of the party deceased, notwithstanding her coverture. In like manner, the party contesting might plead the former sentence as a bar to any further litigation, and, of course, to ordering another issue, or might deny the existence of the alleged agreement or of any right in the wife to bequeathe. That would enable the parties to have distinct decisions on those points, which would be liable to review; just as the course is now on applications to re-propound an ordinary will, or to call in one probate, that there may be another in solemn form. Although we are not aware, that such a method of proceeding has been adopted in such a case as this, and believe that, at all events, there is no such settled practice, yet it is so obviously useful, and, indeed, necessary to the due order of business, the prevention of surprise, and the proper operation of an adjudication in a cause of this kind, as to incline the Court very strongly to require it in future. In the present case the defects of the proceedings in those respects fortunately do not prejudice the justice due to the parties, but rather promote it. For, in whatever form or stage of the cause the decisions of the Court ought to have been made on these points, it seems clear, that they ought to have been in favor of the propounder.

In the first place, the Court holds, that the marriage contract is to be deemed in this proceeding an authority to the wife to make a will. We do not mean, that we now put a final construction on that instrument, and determine that it vested a separate estate in the wife, either absolute or temporary; for those are points not proper for the consideration of the Court in a probate cause. It is true, that this Court exercises, as an appellate tribunal, the functions both of the Court of Probate and the Court of Equity; and, therefore, it might be supposed, that it would be well to decide all the questions that could arise on that instrument at once. But in the form, in

which the case is now before us, the Court can only deal with such matters as were cognizable before the County Court in this very case, because we are not proceeding originally, but receiving the decisions of that and the Superior Court. Therefore we must put no construction on the paper further than to say, that it, at least, gives a color to the act of the wife; for that is sufficient to induce the Court of probate to admit the paper, leaving it to the Court of equity ultimately to construe and enforce the articles and compel the execution of the will, if made, in the view of that Court, under a sufficient authority or by virtue of a sufficient estate in the wife. *Braham* v. *Burchell*, 2 E. Rep. 515. *Chitty's Genl. Pr.* 503.

In the next place, it is clear that there was no definitive sentence against this paper in February 1841. After an issue *devisavit vel non*, there could not be such a sentence but on the verdict of the jury, unless the issue were itself set aside. It appears, indeed, that upon the trial of the issue the Court gave on opinion, that the paper was not a will, because the party deceased was married when she made it, and on that ground refused to admit proof of its execution. If the Court had then gone on to discharge the jury, set aside the order of the issue, and pronounce against the instrument upon the ground, that no authority appeared to enable the wife to make it, there would have been a definitive adjudication. That, however, was not done; but the issue was allowed to stand, though the jury was discharged from rendering a verdict, and no further motion was made by either party. If the party contesting had insisted on a verdict, as he had a right to do, *St. John's Lodge* v. *Callender*, 4 Ired. 335., he must have had one for him, as the case then stood, and that would have settled the matter. But he did not so insist, but allowed the other side to suffer a non-suit, as it was called; that is, the parties mutually, though tacitly, agreed to proceed no further in that cause

or at that time. The propounder may have been induced to take that course, because he had not alleged, or established in that proceeding, the marriage articles; for it no where appears in the transcript of the first cause that any allusion was made to them, except in the will itself; and the other side may have been willing he should bring forward his whole case before a sentence should be pronounced, so that, when given, it should determine the whole dispute. So it is, at all events, that no sentence was given in either way—either in the form of a verdict or of an act of Court. Nor did either of the parties insist there should be.

It is said, however, that, in that point of view, the propounder should have gone on in the first cause, and not have instituted a second original proceeding. The answer is, that no objection was taken in the second cause in the Courts below on that ground; and, indeed, the pendency of a suit is no bar to a second for the same subject, but only matter of abatement. But in reality this does not appear to be the same cause precisely, since now the propounder alleges the articles as giving validity to the wife's will, whereas in the first suit they were not noticed; and therefore the cases are essentially different.

Per Curiam. Judgment affirmed.

JOSEPH HARDY & AL. vs. JOHN WILLIAMS, ADM'R.

Where A. rents out land belonging to B., B. cannot recover against the lessee upon a count on the agreement for rent of the land, because there was no privity between the latter and B., unless B. can shew that A. acted as his agent.

For the same reason a count upon an implied assumpsit cannot be maintained by B. against the lessee, there being no privity between them, and there being an express contract by the lessee with A.

Appeal from the Superior Court of Law of Bertie County, at the Fall Term, 1848, his Honor Judge BAILEY presiding.

This is an action on the case in assumpsit. The declaration had three counts. 1st. A special agreement for the rent of land 2nd. For use and occupation of land. 3rd. For money had and received. The plaintiffs proved, that they owned the land as the heirs at law of Edward Hardy: That in the year ——— one W. W. Cherry, acting as the agent of Mrs. Hardy, who was the administratrix of their father, rented the land to one Holly, at the sum of $—— per annum, for three years: that Holly assigned the lease to said Cherry and the intestate of the defendant, who occupied the premises one year, when they assigned to one Wilson Cherry, who occupied it one year. It does not appear whether any rent was paid or to whom, nor does it appear who occupied the premises the third year.

The defendant read in evidence a decree in a suit of the plaintiff against Mrs. Hardy, in which she was charged with the rent of the land. It did not appear that the decree had been satisfied.

His Honor instructed the jury. that the decree was no defence, and that if the evidence was believed. the plaintiffs were entitled to recover. The jury found for the plaintiffs, assessing damages for the three years. Judgment for the plaintiffs and the defendant appealed.

No counsel for the plaintiffs.
W. N. H. Smith, for the defendant.

Pearson, J. His Honor erred in holding, that the plaintiffs were entitled to recover. Upon the first count, they could not recover, because there was no privity, between them and the intestate of the defendant. To create a privity, it was necessary to prove, that Mrs. Hardy, in renting the premises, acted as their agent, in which case they would be allowed to sue in their own names, the contract being made for them, although the agency was not expressly made known at the time of the renting. There is, in this case, no proof of an agency. The fact, that the land belonged to the plaintiffs, had no tendency to prove it. Indeed, Mrs. Hardy seems to have acted under the impression, that she had a right to rent the land, as the administratrix of Edward Hardy. It was at the election of the plaintiff to treat her as a wrong doer or as their agent, but they are not at liberty, by *supposing* her to be an agent, thereby to affect the rights of third persons and make a privity when none before existed. The defendant's intestate as lessee of Mrs. Hardy was estopped from denying the title of his lessor, and in an action by her, could not defend, by showing title in a third person, and that he had *paid* the rent to that third person.

The same objections apply to the second count, assuming that an action on the case for rent can be maintained upon an implied assumpsit, on the authority of the case of *Hayes* v. *Acre*, Conf. Repts. 19., and *Cummings* v. *Noyes*, 10. Massachusetts Rep. 443., which are opposed to the

English cases, unless the contract is admitted by the pleadings. *Mason* v. *Beldham*, 3 Mod. 73. *Shuttleworth* v. *Garnet*, id. 210. Buller's *nisi prius* 138. In England the action is given by, 11 Geo. 2. ch. 13. In this case there is no privity between the plaintiffs and the defendant's intestate, from which a contract can be implied. It is true, that in many cases, for the sake of the remedy, a tort may be waived, and assumpsit brought on an implied contract, but that is never allowed, when there is an express contract with a third person, for it involves an absurdity to imply a contract to pay one person, when there is an express contract to pay another, and the implied contract will be no answer to the action of the latter, as it would not be in this case, for the reasons above stated.

The third count cannot be sustained, for there is no proof, that any money was received by the defendant's intestate.

It is unnecessary to notice the other point in reference to the decree. This action seems to have been brought by the plaintiffs, who are infants, instead of being brought by Mrs. Hardy, with whom the contract was made, to avoid the statute of limitations. We think the action will not lie in their names.

There must be a *venire de novo*.

Per Curiam. Judgment reversed and *venire de novo*.

DEN ON DEMISE OF HENRY J. TOOLE & AL. vs. ISHAM PETERSON.

The question of identity, where different names are alleged to relate to the same person, is one exclusively for the jury.

Per NASH, J. A witness who has known a town for a great number of years, may give evidence of a general and uniform reputation and understanding that the town was covered by a particular grant.

Per PEARSON, J. and RUFFIN, C. J. The evidence cannot be received for that purpose, but is competent to shew that what was once called the town of N. was now called the town of W.

The cases of *Sasser* v. *Herring*, 3 Dev. 340, *Mendenhall* v. *Cassells*, 3 Dev. & Bat. 50, and *Norcom* v. *Leary*, 3 Ire. 54, cited and approved.

Appeal from the Superior Court of Law of New-Hanover County, at the Spring Term 1847, his Honor Judge BATTLE presiding.

This was an action of ejectment for lot No. 30, in the town of Wilmington.

The lessors of the plaintiff claimed under a grant to *John Whatson* made in 1735, and a deed from John *Watson* to Joshua Grainger, executed in 1737. The lessors of the plaintiff alleged, that John *Whatson* and John *Watson* were the same person, and to prove the identity, they introduced, after objection to it on the part of the defendant, the Register's books, and exhibited nineteen deeds from *J. Watson* and *J. Wattson* to different persons in the town of Wilmington, and then proved, that the descendants of Joshua Grainger Jun'r, the grand-son of Joshua Grainger, Sen'r, claimed and occupied lots on Market street, alleged to have been conveyed by the same deed as that under which the lessors of the plaintiff claimed. They also proved, that no such person or family, as that of *John Whatson*, ever was living within

the knowledge of the witnesses in Wilmington. They, then, after objection to it, introduced Iredell's Revisal, and showed therein, the *title* of an Act passed in 1739, to change the name of Newton into that of Wilmington. They, then, contended, that, from these facts, and especially from its not being shewn by the defendant, from the production of the Register's books or otherwise, that there ever were any deeds to or from *John Whatson*, the jury ought to presume the identity of John Whatson and John Watson, and after the lapse of one hundred years, the jury should be instructed, that a *prima facie* case of identity was made out. The Court instructed the jury upon this point, that they must inquire into the fact of the identity; that the lessors must prove it to their satisfaction, and that, if they had not so proved it, they could not recover; but that, if it were established to their satisfaction, that John Whatson, the grantee, was the same person, who under the name of John Watson sold to Joshua Grainger, the difference of names would make no difference in the title.

The lessors of the plaintiff, in order to locate the grant, under which they claimed, after having shown that from lapse of time no corner or line tree could be found, and that no person could be found, who had ever heard of a line tree or corner of the grant, offered to prove by Dr. DeRosset, who had lived in the town of Wilmington eighty years, that for sixty or seventy years, ever since the witness was able to recollect, it was a matter of common reputation and notoriety in Wilmington, that the town of Wilmington, including the lot now sued for, was covered by the grant, under which they claimed. This evidence was objected to by the defendant and rejected by the Court.

After a verdict for the defendant, the lessors of the plaintiff moved for a new trial, upon the ground, that the Court had misdirected the jury upon the question of

identity; and had improperly rejected the evidence of Dr. DeRosset. The motion was over-ruled, and judgment given, from which, the lessors of the plaintiff appealed.

W. H. Haywood and *W. A. Wright*, for the plaintiffs.
Strange and *D. Reid*, for the defendant.

Nash, J. The first exception to the Judge's charge is, upon the evidence as to the identity of John Whatson and John Watson. The plaintiffs claimed title to the land in question, under a grant issued in 1735, to one John Whatson. The deed of conveyance to his ancestor Joshua Grainger in 1737, was executed by John Watson. To show that these two names belonged to one and the same person, that is, the identity of John Whatson and John Watson, the plaintiffs proved that no such person or family as Whatson ever was living in the town of Wilmington, within the knowledge of the witnesses. They offered in evidence the Register's Books, which after objection by the defendant, were received by the Court, and from them showed nineteen deeds from John Watson and Wattson, to different persons in the town of Wilmington; and they further proved that the descendants of Joshua Grainger, Jun'r the grand-son of Joshua Grainger, Sen'r, claimed and occupied lots on Market street, alleged to have been conveyed by the same deed as that under which the plaintiffs claimed. The lessors of the plaintiff then introduced Iredell's Revisal, and showed therein the title of an Act, passed in 1739, to change the name of Newton into that of Wilmington. This latter evidence was also objected to. The counsel for the plaintiffs moved the Court to instruct the jury, that from the foregoing evidence, and the entire absence of any testimony showing any deed whatever from John Whatson, and after the lapse of so long a time, a *prima facie* case of identity was made out. His

Honor refused so to charge, but instructed the jury that the lessors of the plaintiff must prove it to their satisfaction, and if they had not so proved it, they could not recover. I concur with his Honor, both in receiving in evidence the Books of the Register and in his instruction to the jury upon the question of identity. The books were offered, not to prove title in the lessors of the plaintiff, but to show that such deeds had been made and memorials of them preserved among the public records, and that they contained no copy of a deed executed by John Whatton, as circumstances, which, taken in connection with others, might assist the jury on the question of identity. The fact, that a man by the name of John Watson had conveyed portions of the same land to several persons, though collateral, was connected with the transaction; from which an inference might be reasonably drawn, as to the disputed part, particularly after the lapse of so long a time. But it was an inference, which the jury alone could draw, and it was properly left to them.

In connection with the above exception, was the reception of the title of the Act of 1739, in evidence. It became important to the plaintiffs to prove, that the name of the town Newton, had been changed to that of Wilmington; for the conveyance to Joshua Grainger, the ancestor of the lessors of the plaintiffs and under whom he claimed, was of lots in the former. For this purpose, he offered in evidence, the title of the Act, in question. This was admitted by the Court, though objected to by the defendant. The Act, from the title, appeared to be a private one, of which the Court could not, judicially, take notice, and the title was no evidence of its existence or contents. But upon referring to Davis' Revisal we find, that the change of name was effected by an Act passed in 1756, and which was public in its nature. The Act of 1739, passed for that purpose, was, with many others, repealed by an order in council of the King. After

wards yielding to the representations of the colonial authorities, his majesty authorised and directed "the Governor of the province to give *his* assent to any Act, which shall be passed by the Council and Assembly, for re-establishing the several towns, precincts, and counties," &c. In consequence of the permission thus given, the Act of 1756 was passed. It enacts, "that the several divisions, precincts, and districts of this Province, which heretofore have belonged to the several and respective counties and towns, aforesaid, before the repeal of the before enacted Act of Assembly, shall and they are hereby directed to be re-established in counties and *towns*, by the several and respective names, by which each division, &c. was known and denominated at the time of the repeal of said Acts." *Davis' Revisal, ch.* 9. This Act not only changed the name of Newton into that of Wilmington, but enacted and established the boundaries of several counties. It was, therefore, a public law, of which the Court was bound to take judicial notice. The error, into which his Honor fell, was unimportant, and, in a measure, unavoidable. The Act of 1756 is not brought forward in any of the Revisals, subsequent to that of Mr. Davis', and that is to be found in few private libraries

The question, however, most pressed upon the Court here, was the admissibility of the testimony of Dr. De-Rossett.

The object of his evidence was to complete the title of the lessors of the plaintiffs to the lot in question, by showing that it was out of the State. To do this, it was important, not to show the metes and bounds of the Whatson grant, but that the town of Wilmington was on it. This, it appeared to me, had been already sufficiently done. The grant to Whatson, after locating the land describes it as "called Newton." The deed to Grainger in 1737 describes the grantors, John Watson and his wife, as "living in Newton" or Newtown, and conveys a num-

ber of lots, and then conveys "twenty five acres of the island, opposite to the *said town*," leaving no doubt that the lots conveyed were in the town of Newton. In 1756 the name of the town was changed to Wilmington, which it has borne ever since—a period of ninety-three years. It is then shown to mathematical demonstration, that Wilmington is on the land covered by the Whatson grant. But it was thought necessary by the plaintiff's counsel to fortify this position by showing, that such had been the common rumor on this subject for many years past. Dr. DeRossett, who had lived in the town for eighty years, was tendered to the Court to prove, that sixty or seventy years, indeed as long as he could recollect any thing, it was the common report and belief, that Wilmington was covered by the Whatson grant. To pave the way for this testimony, the plaintiffs had shown, that from lapse of time, no corner or line tree could be found, nor could any person be found, who had ever heard of a corner or line tree of the grant. It appears to me, that the evidence of Dr. DeRossett was competent, and ought to have been received. From necessity, our Courts have departed from the strict rules of the common law in questions of boundaries. *Sasser* v. *Herring*, 3 Dev. 340. It is now the well established law of this State, that the declarations of a single deceased witness, as to a line or corner, are admissible evidence as common reputation. This case goes a step further, and is justified on the same principle to suit necessity. The exclusion of, such testimony would, in many cases of lots in our ancient towns, and of land adjacent to them, put it out of the power of the owners to make title; and this would necessarily result where the boundaries are natural objects of such a perishable nature as most of ours are. While it is admitted, that there is no direct precedent for the admission of such testimony as that in question, it is very clearly within the reasoning of the Court in *Mendenhall and*

Cassells, 3 Dev. and Batt. 50. There the plaintiff offered to prove, "that it was the reputation of the neighbourhood, where the land in controversy lay, that the premises in question were in the boundaries of the grant, under which he claimed." This testimony was rejected; the plaintiff had made no survey, or attempt to survey the grant, and relied solely on the report. In assigning their reasons, the Court say, "we receive it (that is, hear-say) in regard to *private* boundaries, but we require that it have something definite, to which it can adhere; or that it should be supported by proof of correspondent enjoyment and acquiesence." Both of these conditions were absent in the case of *Cassells*, and both are present here. The grant to Whatson is for 640 acres of land in New Hanover precinct, "called Newton and opposite the thorough-fare to the North-west river," and it calls for a line along the river to the station. The land, said to be covered by it, was, and had been for upwards of one hundred years, in different portions, in the possession of those, who claimed under it. Newton was a town in the year 1735, when the grant issued to Whatson, which called for it as embraced in its boundaries. In 1756 the name was changed to Wilmington, which it has borne ever since. Various lots, both in Newton and Wilmington, were conveyed to different persons, and those conveyed to Grainger, or some of them in 1737, were taken possession of by his descendants. It is a matter of history, that Wilmington is, and has been for many years, a populous town, possessing a large shipping interest, and of much commercial importance. The two requisites then, pointed out by the case of *Cassells*, as being either of them sufficient to authorise the admission of hear-say evidence of this kind, exist in this case. The testimony of Dr. DeRossett was, then, clearly competent. If received, it would have proved, that, for seventy years, it had been and was the general rumor and common report, that

Wilmington was located on the land, conveyed by the Whatson grant. Long and notorious possession is very strong presumptive evidence of right, and in questions of boundary authorises the inference of any fact, which can properly be inferred, to make such possession consistent with right. *Norcum* v. *Leary*, 3 Ire. 54. It must be recollected that the inquiry was not as to the metes and bounds of the Whatson grant, but to show that the town of Wilmington was on the ground covered by it, and thereby to prove that the State had parted with its title. If the lot sued for, instead of being vacant, had been enclosed, and in the possession of the defendant, or other individuals, for sixty years, could there be any doubt a jury would have been instructed to presume a grant? This case bears a strong analogy to that class of cases, which, by writers upon the law of evidence, is treated as forming an exception to the general rule, excluding hear-say evidence. The exception is, that, when the subject in controversy is of public or general interest, then hear-say evidence, as to the boundary, under certain restrictions, is admitted. Where all the citizens of the State are interested, the interest is public; where the whole are not interested, but it affects a less, though still a large, portion of them, the interest is general, as in questions arising out of right of common. *Weeks* v. *Sparks*, 1 Ma. and Sel. 690. That was an action of trespass *quare clausum fregit*. The defendant pleaded in bar a prescriptive right of common, in the *locus in quo*; the plaintiff replied, prescribing in right of his messuage to use the ground for tillage. It appeared that many persons, beside the defendant, had a right of common there, and for that reason hear-say evidence of the plaintiff's right was admitted, it being derived from persons conversant with the neighbourhood. But the case, most nearly resembling this, is that of *Rogers* and *Wood*, 2 Barn. and Ad. 245. There the question was, whether the City of Chester an-

ciently formed part of the County Palatine. Testimony of reputation was offered, and rejected, not because, in itself not competent, but because it proceeded from persons, who had no particular knowledge of the fact, that is, of the reputation. And in the *Duke of New Castle* v. *Broxebero*, 4 Barn. and Ad. 273, such evidence was received. The question, there was, whether the castle of Nottingham was within the hundred of Broseboro. The case before us is one of private right, and the cases refered to are, therefore, *no authority*, but they are so similar in their circumstances, that the same reasoning, upon which hear-say evidence was admitted in them, applies with equal force here. 1 Greenleaf's Ev. 217.

I should hold that the existence of a town, for the length of time that Wilmington has existed, and for a much shorter time, would be legal evidence, from which a jury would be directed to presume a grant to the land on which it was located—that the State had parted with its title.

Dr. DeRossett lived in the town of Wilmington, but the case, and I am not permitted to look beyond it, no where states that he owned any real estate in it. He was, therefore, a competent witness to testify to the facts, to which he was called, as he had no interest involved in the controversy. 1 Phil. Ev. 55, 57. And the evidence was competent.

His Honor erred in rejecting the testimony, and there ought to be a *venire de novo*.

Pearson, J. The question of identity was a matter for the jury. There is no such rule of law, which would have authorised the Judge to instruct the jury, that a *prima facie* case of identity was made out, and the plaintiff has no ground to complain of the charge. I think, however, that, if the plaintiffs had been allowed the benefit of the testimony of Dr. DeRossett, the jury could not

have hesitated one instant in finding that the *John Whatson*, to whom a grant was made covering the town of Wilmington in 1735, was the same individual, as the *John Watson*, who in 1737, made a deed to Grainger for many lots, among others, the lot sued for, in the town of Wilmington, and if the plaintiff was entitled to the benefit of this testimony, there ought to be a *venire de novo*. I do not think, that it is competent to prove by tradition and general reputation, that a town is covered by a grant to A. B. That would be, in effect, to locate a grant merely by tradition and general reputation. The fact that a town is upon the land, which a certain grant is *alleged* to cover, can make no difference, and does not tend to prove the *allegation*. The object in this case was not to ascertain the boundaries of a town; it was admitted that the lot sued for was in the town—but to locate the grant. The existence of the town raises a presumption, that the land was granted to some individual, but has no tendency to show, who the grantee was.

This question, in my opinion, is settled by the case of *Mendenhall* v. *Cassells*, 3 Dev. & Bat. 50. "The tradition must have something definite to which it can adhere, or be supported by correspondent enjoyment and acquiescence." "A *tree* may be shown to have been pointed out by persons of a by-gone generation as the corner of an old grant or deed." The *tree* is something to which the tradition can adhere. "A field may be shown to have been reputed the property of a particular man, and to have been claimed, enjoyed, and occupied as such." The occupation supports the tradition.

In that case, as in this, the old grant called for certain water-courses, and corners and lines, but the *tradition did not* refer to either: and, therefore, had nothing, to which it could adhere; and many tracts of land had been long occupied within the supposed boundaries of the old grant, but the occupation was, in no wise, con-

nected with the old grant, save by the tradition, which was held to be too loose a connection for a jury to act upon. So in this case the grant, which it was attempted to locate, had no connection, except by the tradition, with the town, the boundaries of which were known.

I think, therefore, his Honor was right in holding the evidence incompetent, as an absolute proposition. But there were circumstances in this case, which, I think, made it competent, for the purpose of establishing the proposition, which it was necessary for the plaintiff to make out. It was admitted that the lot, sued for, was in the town of Wilmington. It appeared upon the face of the grant, that the grant included the town of Newton, and if, then, Newton and Wilmington were the same, the grant included Wilmington, and, of course the lot. The proposition, then, which it was necessary for the plaintiff to make out, was that Newton and Wilmington were the same. The effect of the testimony of Dr. DeRosset was to prove that fact, for as the grant. upon its face, included Newton, and Newton and Wilmington were the same, it got to be the tradition and general reputation, that the grant included Wilmington.

It is perfectly clear that the names of mountains, rivers, and towns, may be proved by reputation; in fact, that usually, is the only way, in which names can be proved. So, a change of the name of a river or town may be proved in the same way; and it was clearly competent to show by tradition, that the name of Newton had, many years before, been changed to Wilmington. But, in this case, there was, in truth, no occasion to resort to reputation to prove the change of the name, for the change was made by a public law. of which the Court was bound to take notice. The name of Newton was changed to Wilmington by an act of Assembly, passed in 1756. *Davis' Revisal*, ch. 9,——, which was a public act, and established the boundaries of several counties &c.

I am of opinion there ought to be a *venire de novo*.

RUFFIN, C. J. I concur in the judgment of the Court and in the course of reasoning, which my brother Pearson has adopted. Upon the questions, on which the decision below was favorable to the plaintiff, we, of course give no opinion, as they are improperly here on the appeal of the plaintiff.

PER CURIAM. Judgment reversed and *venire de novo*.

DEN ON DEMISE OF HARDY & BROTHER *vs.* JAMES C. SKINNER.

Where A. made a deed of trust to secure creditors, and it was stipulated in the deed that a sale should not take place for three years, and, in the meantime, the trustor should remain in possession of the property, consisting of lands, negroes, &c., and on the trial of a suit, the creditor, impeaching the trust, admitted that there was no actual fraud, but contended that the deed on its face was fraudulent in law; *Held* by the Court, that, whether the deed was fraudulent or not was a matter for a jury, under all the circumstances, but that the Court could not, from what appeared on the face of the deed, say it was fraudulent in point of law, because there might be many circumstances, in which such a deed would be good, and the creditor admitted that it was not fraudulent in fact.

The cases of *Moore* v. *Collins*, 3 Dev. 126, *Harper* v. *Irwin*, 1 Ire. 490, *Cannon* v. *Peebles*, 2 Ire. 449, 4 Ire. 204, and *Dewey* v. *Littlejohn*, 2 Ire. Eq. T. 495, cited and approved.

Appeal from the Superior Court of Law of Chowan County, at the Fall Term, 1848, his Honor Judge BAILEY presiding.

The plaintiff claimed the premises under a purchase by his lessors in 1845, under two judgments and execu-

tions against Wm. R. Skinner: one, at the instance of Mather and Lecompte for $232 51 cents, and the other at the instance of the lessors of the plaintiff for $1388 66. The defendant also claimed the premises under a deed to him from Wm. R. Skinner, made April 26, 1841. It recites, that the maker was indebted to Jas. C. Skinner, the defendant, in different sums on three notes, due July 1st, 1837, October 27th, 1840, and April 5th, 1841, and amounting together to $5142 92; and also that he was indebted upon two other notes for $337 53, each, to fall due Sept. 22nd, and December 22nd, 1841, which the defendant had endorsed to other persons; and that he was indebted to six other persons, named, in different sums, which fell due at several periods in 1837, 1839, 1840, and March and April 1841, amounting in the whole to $1990 38; all which debts, making the sum of $7328 36, constituted the first class of debts secured by the deed. It further recites, that the maker was indebted to thirteen other persons, named, in various sums, which fell due in 1839 and 1840, amounting to $3440 35; whereof two were the debts to Mather and Lecompte and the lessors of the plaintiff, on which the sheriff sold the premises in dispute; which thirteen debts constitute the second class secured by the deed. It then conveys to the defendant 400 acres of land, whereon the maker then lived, 11 slaves, 4 horses, and small stocks of cattle, hogs and sheep, farming tools, and household and kitchen furniture upon the following trusts: That, if at the expiration of three years thereafter, any portion of the debts of the second class should remain unpaid, and the trustee should be required by such a part of the creditors of the second class as should represent the greater interest, he should sell at public sale on six months credit as much of the property as would discharge the debts of the first class and interest; and that he should in like manner sell the remaining property, if any, and with the proceeds pay the debts of the

second class, if sufficient, or, if not, pro rata: And that, if any of the creditors, whose debts are mentioned in the deed and for which the defendant was bound, should require payment of his or their debts before the expiration of three years, then the trustee might at any time sell as much of the property as would satisfy such debts: and, further, that all the property conveyed should be and remain in the possession of William Skinner until it should be required for sale, according to the terms of the deed; and the trustee should not be responsible for it while the possession should thus continue.

The defendant, in further support of the issue on his part, proposed to give evidence, that the deed was made *bona fide* to secure the debts mentioned in it and not to delay, hinder, or defeat creditors. Thereupon the counsel for the plaintiff declared, that he did not impute any actual fraud to the parties, other than what appeared from the deed itself; but he insisted, that the deed was upon its face fraudulent in law, no matter what the defendant might show, and that the Court was bound so to pronounce. It was then agreed, that a verdict should be taken for the plaintiff, subject to be set aside and a non-suit entered, if the Court should be of opinion against the plaintiff upon the question, whether the deed was to be deemed fraudulent upon its face, although the defendant might be able to show, that there was no fraud in fact. The Court subsequently set aside the verdict and ordered a non-suit; and the plaintiff appealed.

Heath, for the plaintiff.

W. N. H. Smith, for the defendant.

RUFFIN, C. J. Although this is a singular and extremely suspicious transaction, yet the Court thinks the plaintiff gave up his case by admitting, that there was no fraud in fact, and that every thing might be taken in favor of

the deed, which could show, that it was *bona fide*. The debts were all over due at the date of the deed, except two small ones, for which the trustee was liable and and which were to fall due in the course of that year; and as to which, the trustee might sell property when the creditors might require. For the residue of the debts however, there was to be no sale for three years; and after that there was to be a sale for the satisfaction of the first class of debts, not at the instance of the creditors to whom those debts were owing, but at that of the second class of creditors; and during all that time, the deed stipulates, that the debtor shall retain the possession. This is a very extraordinary provision, certainly; and it would seem, that a jury, viewing it as men of common sense, and inferring further from the deed the probability that the maker was insolvent or greatly embarrassed, would hardly doubt upon the deed itself that it was an object of the deed to provide for the debtor. The Court has often held, that when this is the purpose of a deed, or one of its purposes, it is fraudulent and void under the statute. *Moore* v. *Collins*, 3 Dev. 126. *Harper* v. *Irwin*, 1 Ired. 490. *Cannon* v. *Peebles*, 2 Ire. 449. 4 Ire. 204. *Dewey* v. *Littlejohn*, 2 Ire. Eq. 495. An unusual and unreasonable postponement of the sale, the debtor in the meanwhile taking the profits, affords very strong evidence of fraud, in that it denotes a part of the purpose to have been to *secure* a benefit to the insolvent debtor, whereas the purpose ought to have been to devote the whole of the property to the satisfaction of the debts. The counsel for the plaintiff contends, that it is such strong evidence of *mala fides*, as to be conclusive: that it is express fraud, and does not admit of explanation. The Court, however, cannot go that far; as it is quite conceivable, that cases may exist, in which such a provision as this would not be fraudulent. It would not, indeed, be sufficient, that the debts mentioned were just; for it is a fraud not to apply

the debtor's property to their satisfaction in a reasonable time, but reserve it for his use; and, certainly, a reservation for three years is startling and *prima facie* for the debtor's benefit. If the party was insolvent, so that the jury should believe he was aware that the debts could not be paid but by a sale of the property, it is plain the stipulation for a possession for three years would be but a provision for so much longer enjoyment of the property by the debtor: and it would be clearly fraudulent. It is true, that the land might be sold under execution as an equity of redemption. But the remedy derived therefrom by the creditor would be merely illusory in respect to the period of the possession to be enjoyed by the debtor, as in most cases it would take the three years for the creditor to reduce his debt to judgment, make a sale, and bring an ejectment to trial. Besides, this deed complicates land, negroes, and other chattels together, and in respect to the latter the creditors would have no means of enforcing a sale but the dilatory and expensive remedy in equity. When the debtor merely continues in possession by the sufferance of the trustee and creditors, it affords a presumption of fraud, only as it tends to prove a secret trust for the debtor: and that is capable of being rebutted by evidence of the debtor's ability to pay his debts, or the power of the creditors to require a sale at any time. But a stipulation in the deed for possession by the debtor, for a long time, is an express trust for him; which might lead to great abuses, if tolerated, and must be *prima facie* fraudulent, unless the period should be so short as to leave it indifferent, whether it was for the convenience of the trustee or the benefit of the estate on the one hand, or, on the other, for the benefit of the debtor. But, notwithstanding these bad appearances, we think, the intent is open to evidence, either direct, or arising out of facts and circumstances; and it cannot be inferred absolutely, as a dry matter of law, by the Court. There are

several reasons, why it cannot be done, as is stated in the cases already referred to. Though it be probable, for example, that this deed conveyed all or nearly all of the maker's property, and that it was not of value sufficient to pay his debts; yet those facts do not appear upon the instrument itself, and therefore could not be assumed by the Court, though they might be presumed by a jury. Now, if this person was not insolvent but had other property amply sufficient to cover all his debts, and these creditors wished to keep their money at interest, and in consequence thereof, the day was deferred at their instance and not that of the debtor, it could not be argued that the deed was void; for it would work no hindrance to other creditors, who might go against the other property. Again, the defendant might have been able to show, for aught to be seen to the contrary, that in fact the debtor was bestowing his labor, and laying out money of his own or of the second creditors, in making improvements on the estate, which would greatly enhance its value and require the three years to complete. Or it might be, that the debts mentioned in the deed, among which are the two for which the premises were sold, were all the maker owed, and that the deed was made in this form with the privity and full convenience of all the creditors. In those or other similar cases, which may be supposed, it would be clear, that there was no fraud. For in the one case the debtor was rather serving the creditors, than himself, by remaining on the property; and in the other, one could not allege covin in a provision, of which he himself was the author. Although, then, as far as the case proceeded at the trial, it might have authorised a verdict for the plaintiff, yet the transaction was susceptible of explanations, which might have repelled the suspicion of fraud, and entitled the defendant to the verdict.

Therefore, the judgment must be affirmed.

Per Curiam. Judgment affirmed.

JOHN BRITT *vs.* JOHN PATTERSON & AL.

Where an attachment was issued by a justice of the peace for a sum above his jurisdiction to try, and was made returnable before him or some other justice, and where the County Court permitted the plaintiff to amend the process by making it returnable to the County Court, and the County Court also permitted the defendant to appeal, upon his giving bond, &c., though he had not replevied. *Held*, that the defendant was entitled to appeal, notwithstanding he had not filed a replevin bond. And *Held*, secondly, that where it appeared that the defendant was not able at the time to procure sufficient securities for an appeal, he was entitled to a *certiorari*, without shewing any merits in fact, the case disclosing, that there were questions of law, which he had a right to have decided by the Superior Court.

The cases of *Brooks* v. *Morgan*, 5 Ired. 484, and *Trice* v. *Ray*, 4 Ired. 11, cited and approved.

Appeal from the Superior Court of Law of Greene County, at the Spring Term, 1848, his Honor Judge DICK presiding.

The plaintiff sued the defendant by attachment. The sum demanded was four hundred and fifty dollars. The writ was issued by a single magistrate, and made returnable before him or some other justice of the peace. The attachment was directed to a constable, who had levied it on property belonging to the defendant. In the County Court, the defendant, by his counsel, moved to dismiss the proceedings, which was refused by the Court, and the plaintiff moved to amend, so as to make the writ returnable to the County Court. This was objected to by the defendant, but allowed by the Court. From this judgment the defendant prayed an appeal to the Superior Court, which was granted, on condition of his entering into bond for $1000, with sureties, which he failed to do. The defendant moved his cause into the Superior Court,

by *certiorari*, and in his petition states the foregoing facts, and that his failure to procure sureties was owing to the magnitude of the sum required, and, as he was informed and believed, to the improper interference of the plaintiff, Britt. In the Superior Court, Britt filed his affidavit, admitting the facts set forth in the petition, except as to his interference to prevent the defendant from procuring the requisite sureties. He further states, that his counsel in the County Court objected to the right of the defendant to appear or be heard in the Court, until he had made himself a party by replevying the property levied on, according to the Act of Assembly, and as he was not a party to the suit, he was not entitled to appeal from the judgment of the Court and consequently had no right to a *certiorari*. His Honor, the presiding Judge, being of this opinion, the *certiorari*, on motion of the plaintiff, was dismissed, and the defendant appealed.

Husted and *J. H. Bryan*, for the plaintiff.

Rodman, for the defendant, submitted the following argument:

1st. Had the justice who issued the attachment power to make the amendment?

"The Court in which any action shall be pending shall have power to amend any process," &c.

If such amendment be made to any pleading in matters of substance, the adverse party shall be allowed an opportunity according to the course and practice of the Court to answer the pleading so amended." *Rev. Stat. Ch.* 3, *Sec.* 1 *and* 2.

Supposing the justice to be a "Court" within the meaning of the Act. It is contended,

1st. That process absolutely *void*, is not "process" within the meaning of the Act and cannot be amended in any Court.

2nd. That the justice could make no amendment of the nature of that made by him, viz: transferring the suit to the County Court because it would be incompatible with the 2nd section of ch. 3, Rev. Stat.

1st. Process absolutely *void* cannot be amended in any Court, *Kenworthy* v. *Peppiat*, 4 B. & A. 288, (6 E. C. L. R. 426.) 1 *W's. Dig. p.* 145, *sec.* 1, and cases there cited. 4 *Cow.* 49, 504. *Johnson* v. *McGwin*, 4 Dev. 270.

2nd. To allow a justice to make an amendment of the character of this, would produce great injustice, as a justice keeps no records. A defendant (who has no notice of the amendment,) would never know where to find a suit against himself, nor where to appear, and has no opportunity to answer according to the statute.

3rd. The County Court had no power to amend, because the process was not pending before it. *Smith* v. *Tow*, 2 Ire. 344, and also because the process was absolutely void.

4th. An attachment is not amendable in matter of substance.

An amendment of a bailable writ discharges the bail, 1 *Arch. Prac.* 317.

The seizure of property is in lieu of an arrest and bail, and by an analogy, the amendment discharges the property and would thereby dissolve the attachment.

5th. The Court should have dismissed the attachment, notwithstanding the defendant had not replevied.

Sergeant on Att. 147, citing 1 *Dall.* 219, *Doane* v. *Penhollow*, Id. 152, Id. 158, show that the irregularity may be pointed out by the defendant or any other person, and the Court is bound to notice an error apparent on the record. *Serg. Att.* 138.

As to the right of defendant to appeal.

Anders v. *Meredith*, 4 Dev. & Bat. 199, decides that where the Court has *the power* to amend and exercises its discretion, there is no such right. See *Cape Fear Bank*

v. *Williamson*, 2 Ire. 147. *Dickinson* v *Lippet*, 5 Ire. 560. *Slade* v. *Burton*, 6 Ire. 207. The presumption is that the judge did not hear the evidence, but decided simply on the right to appeal from the County Court.

NASH, J. In the case sent to this Court, it is stated, that the plaintiff moved to dismiss the *certiorari*, because the defendant, not having replevied the property levied on, was not in Court, and on the other grounds set forth in his affidavit. The first enquiry was, under the circumstances of this case, was the defendant entitled to an appeal from the County to the Superior Court? We think he was. The Act of 1777 is very broad and comprehensive in its terms, in granting appeals—"if any person, either plaintiff or defendant, *or who shall be interested*, in any judgment, sentence or decree of any County Court shall be dissatisfied," &c., he may appeal, &c. Here the defendant was a party, and the only party defendant—against him alone, the attachment issued. Before he was entitled to plead, it was necessary he should replevy, because the attachment is to compel an appearance. The judgment, from which the defendant appealed, was not one denying him the right to plead, but from one dismissing the *certiorari*, denying him the right to bring his case before the Superior Court in that way, because not entitled to appeal. Under the act of 1777, he was entitled to the appeal. The next enquiry is, had he a right to the writ of *certiorari*, under the circumstances of his case? The petition states, and the answer of Britt does not deny it, that the County Court granted the appeal, upon the defendants giving bond and good sureties in the sum of $1,600, and he was unable to give the bond, in consequence of the magnitude of the sum designated. The sum was a large one, being more than double the amount of that demanded in the writ. Whether there was any oppression in this or not, is not now to be

decided. The defendant swears that he endeavored to procure sureties and failed, and by that inability was deprived of the right secured to him by law. But the law does not suffer any man to be deprived of his rights by fraud. accident or mistake, and the ordinary use of the writ of *certiorari* is to supply the place of an appeal, where a party has been deprived of it, from either of the causes. above enumerated. *Brooks* v. *Morgan*, 5 Ired. 484. The same, cause assigned here by the defendant for not availing himself, was assigned by the plaintiff in the case *Trice* v. *Ray & Yarboro*, 4 Ire. 11, to-wit: inability to procure sureties to his appeal bond. But it is said, that the defendant had not sworn that he has a good defence to the action, or to merits. In this case we do not deem it necessary, that he should state other merits than those apparent in the record. They raise questions of law of material import in the cause, which were proper for the consideration of the Superior Court, to-wit: whether the property was not discharged by the alteration of the attachment by the magistrate, and whether the amendments were properly made in the County Court, and for the want of a prosecution bond, after the alteration by the magistrate, besides others. *Collins* v. *Nall*, 3 Dev. 224. The defendant was deprived of the remedy provided for him by the Act of 1777, by no fault of his, and the *certiorari* was the only mode by which he could be placed in a situation to have his cause heard.

We are of opinion his Honor erred in the judgment given.

Per Curiam. Judgment reversed and cause remanded.

WILLIAM BARNES vs. ASAEL FARMER & AL.

In an action for harboring a slave, to which the statute of limitations was pleaded, the plaintiff could not prove any act of harboring with n three years before the commencement of the action, but proved that the defendant had harbored the slave for several years before that period; *Held*, that the Court should have instructed the jury that there was no evidence to rebut the plea of the statute of limitations, or from which the jury could infer any act of harboring within the three years.

Appeal from the Superior Court of Law of Edgcombe County, at the Spring Term, 1848, his Honor Judge CALDWELL presiding.

This was a suit to recover damages for harboring a slave. It appeared in evidence, that the said slave had belonged to the defendant, Asael Farmer, and had been sold under execution in 1835, and purchased by the plaintiff; that he took the said slave into possession, and, immediately thereafter, he absconded and remained out until January, 1845. The witnesses, on examination, testified to various acts of harboring, from shortly after the said slave ran off, until the Fall of 1842, such as seeing him on the plantation of the defendants, at and about their house and out houses—seeing caves and a shelter on their lands, and one near their house, having the appearance of being used, as places of concealment by some one; and one witness testified that he had seen the slave at a camp on the land of the defendants, in company with the defendant, William, while he was out, and the said William then spoke of him as a runaway. This suit was commenced on the 15th of September, 1846.

The counsel for the defendants moved the Court to charge the jury, that the statute of limitations barred the

plaintiff's right to recover damages for any harboring, previous to the 15th of September, 1843; and that there was no evidence after that time to subject the defendants. The Court declined so to charge, but told the jury, that, though the statute did protect the defendants, as to any harboring before the 15th of September, 1843, yet they might look to the antecedent acts of the defendants, and if they believed from them, that the harboring was continued after the 15th of September, 1843, the plaintiff would be entitled to recover for the loss of the services of the said slave, after that time.

The jury returned a verdict for the plaintiff. The defendants moved for a new trial, because of misdirection, which was refused, and they appealed.

B. F. Moore, for the plaintiff.

Whitaker, for the defendants.

NASH, J. The only question presented is, as to the charge upon the statute of limitations. We think the defendants were entitled to the instructions they asked, and that his Honor erred in refusing them. In proportion to the atrocity of conduct imputed to any one, ought to be the care, with which we should guard ourselves against the feelings it naturally excited. The crime, imputed to the defendants, for it is a criminal act, punishable by indictment, is little less than that of stealing, and only less, because the law does not make it a felony. The slave had been sold to pay the debts of the defendants, and for seven years, the plaintiff had been by them fraudulently deprived of his services. The feelings naturally excited by such conduct should not be permitted to obscure our judgment. Criminal as the defendants certainly were, and deserving of all the punishment, which the law affixed to their actions, they are still entitled to the protection, which the law throws around their per-

sons. The statute, which makes the harboring of a slave an indictable offence, also give to the owner an action for the damages he may have sustained. The time, within which such action shall be brought, is regulated by the general statute of limitations. By it, it is enacted, that actions upon the case must be brought within "three years next after the cause of such action or suit occurred, and not after." Every act of harboring a slave is a fresh cause of action, but an action when brought covers all such acts for three years next before the bringing of the suit, for the law does not countenance the splitting up of actions. In this case, the writ issued on the 15th of September 1846, and embraced all the time between that period and the 15th of September 1843, and could not, by force of the statute, extend any further back. This was the opinion of the presiding Judge, and he so charged, but he proceeded "that they might look to the *antecedent* acts of the defendants, and if, from them, they believed, that the harboring continued after the 15th of September 1843, the plaintiff would be entitled to recover for the loss of the services of the slave after that time." This was stating to them, that the acts of harboring down to the Fall of 1842, were evidence of a harboring after the 15th of September 1843. In this opinion we do not concur. It is, in effect, holding, that the defendants, having been fixed with acts of harboring, at any time before the action was brought, were to be considered as still harboring, not only down to the time, when the statute of limitations would begin to run, but to the bringing of the action. Such a construction would virtually repeal the statute in every case, where there was more than one act of harboring. Nor can we see, why, if correct, it should not have that effect in every case. A dozen acts of harboring in 1842 is no more evidence of a harboring after the 15th of September, 1843, than would be one such. If, in measuring the time, which the statute

covers, we pass the 15th of September, 1843, where shall we stop, in '42, '41, '40, or where else? It is impossible, that a transgression of the law, in either of those years, can be evidence of such transgression in '43. A., in '42, steals the negro of B., who regains the possession of him; in '43, it is alleged he stole the slave again; could it be pretended, that, on an indictment for the latter offence, the first taking could be given in evidence to convict? Again, in an action for usury, evidence of other usurious contracts of the defendant, either with the same or another person, would not be evidence. 7 *East*, 109. *Spencely* v. *Willott*. The general replication in this case to the plea of the statute, is, that within three years next before the bringing of the action, the defendants did harbor the slave. Is the replication supported by evidence, that he harbored him four years before the action was brought? In an action of fraud in the sale of personal property, if the defendant plead the statute of limitations, it is no sufficient replication, that, within three years next before the bringing of the action, the defendant acknowled the fraud. *Oathout* v. *Thompson*, 20th John. R. 277. That was an action of *tort* for fraud in the sale of a slave —this is an action for a tort in harboring a slave. In the former, the confession referred to the time of the sale, when the fraud was committed, which was not within the time limited by law for bringing such actions. If, in this case, the defendants had confessed, after the 15th of September, 1843, that they had harbored the slave, previous to September 1842, it would, according to the case cited above, be no evidence to bring the case within the statute. Much less, could the *fact* of harboring, previous to the Fall of '42, be any evidence of a harboring after the 15th of September, '43, more than a year thereafter. The plaintiff, by his replication, undertook to show, that the defendants had committed the offence within the three years next before the bringing of the action; and he must

prove an *act* of harboring, within that time, either by positive evidence, or by proof of such circumstances occurring within that time, as could justify a jury in so finding. It may be that the law ought not to shield from punishment, the perpetrators of such offences. Yet it has been the pleasure of the Legislature to limit to two years the prosecution of all misdemeanors, with a few exceptions. If this, instead of being a civil suit, were a criminal prosecution for this offence, would the proof of an act of harboring in the Fall of '42 support an indictment, commenced in '45; or would it be correct to refer the jury to the act in '42, as justifying a conclusion by them, that the offence had been perpetrated within two years next before the preferring of the indictment? It is true, these are certain facts which are of such a nature, that the law presumes their continued existence, until it is shown that they do not exist. Thus a man, who is shown to be in life at a certain time, is presumed to be still in life, until it is shown that he is not in life, either by proving his death, or such a lapse of time, since he was last heard of, as raises a counteracting presumption of death. So, also, sanity, when established previous to doing a particular act, is presumed to continue at the time the act is done, until the contrary is proved. But harboring a slave is not a continuous act, and no presumption arises from the proof of one such act, that another at a subsequent time, has taken place. If the slave had been seen on or near the premises of the defendants after the 15th of September 1843, the acts of harboring previous thereto would be evidence, not to increase the damages, but to show the nature of the act of being at the place at that time.

Ruffin, C. J. The declaration was for harboring the slave from the year 1835, to September 15, 1846; and the prayer of the defendants' counsel was for instructions

upon two points. The first, that for the harboring which occurred before September 15th, 1843, that is, three years before suit brought, the action was barred by the statute of limitations; and the second, that there was no evidence of any harboring after that day. The presiding Judge declined giving the whole instruction, as prayed for, including both propositions. But he gave it, as asked, in respect to the first point; and then he left the case to the jury on the second point with instructions, that they might look to the antecedent acts of the defendants, and if they believed, from them, that the harboring was continued after the 15th of September, 1843, the plaintiff would be entitled to recover for such harboring as took place after that day. Such is my understanding of the case stated in the exception; and therefore it strikes me as not being precisely correct to say, that his Honor had refused to apply the statute of limitations to the plaintiff's demand. For I consider that he did so in direct terms, to the full extent required by the party and the law; so that the jury were obliged to understand, that they could give damages for only such harboring, if any, as actually took place after September 15, 1843. The question, then, as it strikes me, is, whether there was evidence of a harboring within that time. His Honor thought there was, because it might be inferred by the jury, that the defendants had harbored the slave from September 15th, 1843, to September 15th, 1846, inasmuch as they had harbored him from 1835 to the Autumn of 1842. So, the point is, as it seems to me, simply this: whether the previous harboring constitutes such circumstantial proof of a subsequent harboring as ought to have been left to the jury as competent to establish it. If it was competent, the verdict ought to stand; because it is the province of the jury to weigh and determine the effect of evidence, as enabling them to infer one fact from another, with this proviso, however: that the fact, from which the other is inferred,

would be such as affords a fair presumption of the required fact. It is that proviso, which raises the question of the competency of the circumstantial evidence in any case; for it is a question of just reasoning, what inferences may be made from an admitted or established fact. Therefore, if the fact sought cannot be rationally deduced from the circumstances relied on, the circumstance itself ought not to go to the jury, because its consideration cannot serve the justice between the parties, but may mislead the jury. Suppose, in this case, the declaration to have been only for the harboring from September 15th, 1843, so as to make the statute of limitations altogether inapplicable—which, indeed, is the state of the case under the opinion given on that point to the jury; the question then would be a naked one, whether the harboring laid would or could be established by the previous harboring. It is often a delicate point to determine what may or may not be justly inferred from particular premises; and persons will frequently differ upon it When I see that a learned Judge thought, that a harboring up to the time of the action might be presumed, and that twelve gentlemen were able to affirm on their oaths its actual existence, because it had been practised for several years before and down to 1842, I cannot but be somewhat diffident of my own conclusions to the contrary, and reluctant to disturb the verdict on that ground. But, as the law does not allow a question to be submitted to a jury without evidence, which means also, with such evidence as, taken in the whole, will not fairly authorise a verdict in favor of the party offering the proof—in other words, evidence, on which a Judge must say, he could not find a verdict—it seems to be the imperative duty of the Court here to reverse the judgment, when a case in that situation has been left to the jury. Now, it seems to me, notwithstanding the previous connection between the slave and the defendants, that one cannot justly and with any rea-

sonable confidence affirm, that the connection continues for four years after the last visible trace of its existence. And after the expiration of that period it may be fairly contended, I think, that, if the harboring did not continue duing the whole period, it did not exist at all within it. For, it is a much stronger presumption now, that it did not exist, for instance, in 1843, than it was in that year, because, then it might be said, there were not opportunities, and that time had not been allowed to discover direct proof. But, now, the negro has been taken and could point out the means of establishing the fact, if it had occurred, and there has been full scope for enquiry in other quarters for nearly six years, in all, since the latest day to which the direct proof brought down the harboring; and the whole period affords not the slightest vestige of a harboring or correspondence of any kind after the autumn of 1842. If it appeared, that the caves and other places of secret resort, once used by the runaway, had been still in use by some one, or that this negro had been seen in the neighborhood of the defendants, although personal intercourse might not be directly shown, there would be something for the mind to act on, and, possibly, the case might have been fit for a jury's deliberation. But, with nothing further than the naked facts, that ten years before the negro had belonged to the defendants, and that four years before they had entertained and concealed him, the case is too bare of proof to go to the jury. There is nothing within the time; and the previous circumstances, thus solitary and antiquated, afford a presumption too remote and inconclusive to be the ground of judicial determination.

I concur in holding, that the judgment must be reversed and a *venire de novo* awarded.

Per Curiam. Judgment reversed and *venire de novo*.

STATE TO THE USE OF HENRY G. PARISH vs. ELLISON G. MANGUM.

In an action against a constable for a breach of his official bond, in not collecting a debt, the relator is entitled to recover at least nominal damages, when he shows neglect and unreasonable delay in the collection, although the plaintiff may have received the amount of his debt from the constable after the commencement of the action.

Appeal from the Superior Court of Law of Orange County, at the Spring Term, 1848, his Honor Judge PEARSON presiding.

Debt on a constable's bond. The breach, assigned in the declaration, was want of diligence in the collection of a judgment. On the 3rd of March, 1842, the plaintiff put into the hands of the defendant, a judgment rendered by a magistrate against Thomas D. Crane. The execution was taken out by the defendant on the 16th of the same month, but he proceeded no farther on it, until the month of June succeeding, when he levied on the land of the defendant in the execution. At the time the execution issued, Crane had personal property abundantly sufficient to discharge it, which was known to the defendant —Crane died on the 17th of April, and on the day succeeding, the sheriff levied on his personal property to satisfy other executions, and sold it, and applied the money raised to satisfy them. The constable's execution, with the other papers, with the levy made by him, was duly returned to the County Court; and after a lenghtened litigation and much delay, the land levied on was sold under a *venditioni exponas*, and the plaintiff received the amount of his debt from the constable, the defendant, in 1846. At the same time he protested against receiving

it in satisfaction of his cause of action in this suit, which was then pending in Orange County Court.

The defendant's counsel moved the Court to charge the jury, that the evidence, if true, did not show a breach of the defendant's bond, as the plaintiff had got his money. This was refused, and the jury was charged, that, if the evidence was true, a breach of the bond, in not using proper diligence on the part of the officer, was shown, which gave the plaintiff a good cause of action against him, and that the receipt of the money afterwards could only have the effect of mitigating the damages to a nominal sum.

Verdict for the plaintiff to that effect, and appeal by the defendant to the Supreme Court.

Norwood, for the plaintiff.

McRae, for the defendant.

NASH, J. We concur with the presiding Judge in his charge. The instruction required could not be given. The official bond of the defendant was broken, although the money was received by the plaintiff, subsequently to the bringing of this action in the manner and under the circumstances set forth in the case. The law requires that all process shall be served by the officer, into whose hands it may come, with all convenient speed, and in the manner prescribed. By the act of 1794, Rev. Stat. ch. 62, s. 16, it is directed that the officer, to whom a Justice's execution is directed, must levy upon the goods and chattels of the defendant, or for want of them on his lands and tenements. The primary fund for the payment of debts, by the law, is the personal property of the defendant. Nor can a constable, without a gross violation of his duty, pass that by and levy on the land; the latter is not to be touched by him until he can on his oath say, that no goods and chattels of the defendant could be

found by him. It is his duty to go to the residence of the debtor, and seek for personal property. At the time the defendant took out the execution, Crane had personal property, much more than was sufficient to discharge it and this was within the knowledge of the officer. Why he did not seize it, he does not explain. In consequence of the levy he did make, the plaintiff was thrown into a tedious, prolonged contest in Court, and, instead of the speedy remedy provided for him by the law, was compelled to pursue the one, which the unreasonable conduct of the officer had rendered necessary. After a litigation of near four years, he received his money, which he might have done in ten days after the 17th of April, if the law had been obeyed. For the delay in the collection of the money, the plaintiff was not entitled to any damages; the interest which accrued is considered sufficient for them, but for his additional expenses in prosecuting his suit in Court, over and above those which were taxed against the defendant, he would be entitled to compensation. He, however, has proved nothing paid by him, and, therefore, is entitled to nothing for them. The reception of the money by the plaintiff did not defeat his action, for it was received under an express exception by the plaintiff, that it should not have such effect, and a tacit assent thereto by the defendant. But the plaintiff is entitled to the damages the law implies in every breach of official duty, which in this case is but nominal.

Ruffin, C. J. When this suit was brought, the contest was no doubt a real one, whether the defendant was liable for the relator's debt; as he would unquestionably have been, if the money had not been made from the land. It is not material to consider, whether that recovery could be given in evidence under the plea of conditions performed, inasmuch as the relator admitted satis-

faction *pro tanto* of the damages arising from the breach suggested in the declaration, and only claimed a verdict for enough to carry the costs. Whether he had sustained any damages, which remained unsatisfied, was the point. That he had, in legal contemplation, seems clear. For, although the money was ultimately raised, it was effected at an expense of money or labor, which would not have been incurred, if the defendant had pursued the direct and legal method of taking the goods. Ordinarily, indeed, the creditor has no concern, whether a sheriff levy on goods or land; for, it is not material to him, so that he gets his money at the return of the writ, and he, in fact, gets it without either more or less cost in any way, whether the sheriff take the one or the other kind of property. But it is not so with respect to executions issued by a Justice of the Peace; for the creditor is necessarily injured to some extent if the constable fail to levy on the goods, when he can, and, instead of doing so, levy on land. It is so, because a constable can sell goods and obtain satisfaction without any further agency, direct or indirect, of the creditor, further than finally to secure his money; whereas, by levying on the land, he compels the creditor to be at the expense of employing an attorney to get the judgment affirmed or an order of sale and sue out execution, or, at least, puts the creditor to the trouble of attending in person to perform those acts for himself. It seems plain, that in this way the creditor has an interest—one, that is pecuniary—that a constable should levy on the personalty, when accessible to him, and not on the land; as by the former, the creditor gets his debt without the loss of either time or money, while by the latter, a loss of one or the other is unavoidable. Therefore the relator must have sustained, at the least, the nominal damages assessed: and on that ground, I agree with my brother Nash, that the judgment should be affirmed.

Per Curiam. Judgment affirmed.

DEN ON DEMISE OF SAMUEL ANDERS *vs.* TIMOTHY ANDERS.

Where an award has been made by referees, under a rule of Court, and confirmed by the Court, it is binding on all parties, and while it remains unreversed the judgment cannot be contradicted.

Where a tenant in common holds over after partition, his possession shall not be considered adverse, until a demand is made by the other tenants, unless he does some act amounting to an actual exclusive possession, which could give notice that he intended to keep out all others, or some act amounting to a disclaimer of the rights of the other tenants.

The cases of *Love* v. *Edmondson*, 1 Ire. 152, and *Murray* v. *Shanklin*, 4 Dev. & Bat. 291, cited and approved.

Appeal from the Superior Court of Law of Bladen County, at Spring Term, 1848, his Honor Judge BAILEY presiding.

This is an action of ejectment to recover the land mentioned in the plaintiff's declaration. Both parties claim under John Anders, Jr., who died in 1814, leaving several children, among them the defendant and James Anders, who died in the year ——— leaving the plaintiffs and several other children. In the year ——— a petition was filed by the heirs of John Anders, for a division of his real estate, in the County Court of Bladen County where the land lay. At ——— term, by the Court, five commissioners were appointed to make partition, who made their report to February term 1835, and at the same term, it was confirmed and ordered to be recorded and registered. The present defendant, at the May term succeeding, filed his petition to rehear the decree so made, and at August term succeeding, it was, by an order of the Court, dismissed, and the petitioner appealed to the Superior Court, where the case was continued from term t

term, until October term 1839, when it was referred to the arbitrament of Robert Strange and Owen Holmes, Esqrs., who made their award, under their hands and seals, to Spring term, 1840, when it was confirmed by the Court and ordered to be certified, enrolled and registered, which was accordingly done. The arbitrators incorporated into their award, the report made by the commissioners to the County Court in 1835. It appeared from the award, that the submission was made by the parties, and under a rule of Court. It recites, "this cause, by consent of parties and under a rule of Court, being referred to Robert Strange and Owen Holmes, with power, &c., and their award to be a judgment of the Court, and that the parties, agreeable to said award, and if so required, are to execute new title deeds, so as to pass and vest the title to the disputed premises, agreeable to said award." The arbitrators then award "that the lands of John Anders, Jr, be, and they are hereby divided among the said parties, as they were heretofore divided by Wm. H. Beatty," &c. Mr. Beatty, and the other persons mentioned in the award, were the commissioners appointed by the County Court of Bladen to make partition. By that partition, lot No. 2, the land in dispute, was allotted to the heirs of James Anders. Before this action was commenced, the plaintiffs had demanded the possession of the land from the defendant, who refused to deliver it up—the demand was made at the town of Elizabeth, which is twenty miles from the premises.

The plaintiff claims the lot in question, as one of the heirs and as a purchase from the other heirs. The defendant claimed to have been in the adverse possession of the lot when those deeds were executed, and that they conveyed nothing to the plaintiff, and denied that the arbitrators had any right, under the submission to divide the land of John Anders, Jr, and that the demand, as proved, was not sufficient.

His Honor instructed the jury, that the demand was sufficient, and that, if at the time the lessor of the plaintiff purchased from the other heirs, the defendant was in possession of the land, claiming it adversely, the deeds passed no title, and the plaintiff could not recover but one sixth of the lot in question, but if the defendant did not hold adversely, at the date of the deeds, then, if they were satisfied that lot No. 2 had been allotted to the heirs of James Anders by the commissioners, and the defendant was in possession and refused to give it up on the demand, which was made, the plaintiff was entitled to recover the whole of said lot, and they should find the defendant guilty.

The jury found a verdict for the plaintiff and judgment being rendered, the defendant appealed to the Supreme Court.

Strange, for the plaintiff.

W. H. Haywood and *W. Winslow*, for the defendant.

Nash, J. Exception is taken to the charge of the presiding Judge upon the ground, that he erred in his instruction to the jury as to the allottment of No. 2, in the partition, made by the commissioners. After the case on the petition to re-hear had gotten into the Superior Court, the parties agreed to refer the case to the arbitrament of two gentlemen, selected by themselves, to-wit: Messrs. Strange and Holmes, which was made a rule of Court. These referrees, in their award, adjudge, "that the lands of Jno. Anders. Jr., deceased, be and they are hereby divided among the parties, as they were heretofore divided by William H. Beattie," &c. Mr. Beattie and the other persons, mentioned in the award, were the commissioners, appointed by the County Court, to make partition of the lands of John Anders, jr., among his heirs, and in their report, the lot No. 2, the one in question, was allotted to

the heirs of Jas. Anders. It is contended by the defendant, that the arbitrators exceeded their authority in making partition of the land. This may be so, but the objection is not now open to him. The award was returned to the Court, and confirmed by a judgment of that tribunal. As far as the case discloses the fact, the defendant made no opposition, and acquiesced, not only in the report, but in the judgment. Then was the time for him to have made known his objections. That judgment is still in full force and unreversed, and while it continues in force, being a record, it cannot be contradicted, because it imports absolute verity, as to every thing embraced in it. By the judgment of the Superior Court, then, on the award, the lot in question, No. 2, was allotted to the heirs of James Anders.

The defendant further excepts to the charge, because his Honor instructed the jury, if lot No. 2, was allotted to the heirs of James Anders, that the plaintiff was entitled to recover the whole lot. The plaintiff was one of the heirs of Jas. Anders, and claimed to have purchased the shares of all the other heirs. To the conveyances from them, the defendant objected, that he was, at the time of their execution, in the adverse possession of the land. The question was left by his Honor to the jury to ascertain, whether the defendant's possession was adverse or not; of this the defendant had no right to complain. To the time of the partition made, he was in possession as a tenant in common with the other heirs of John Anders and held the possession for them as well as for himself. The partition, it is true, severed the joint possession, but by itself, it did not make the possession of the defendant adverse. He held over by the sufferance of the heirs to whom it was allotted: in which case, notice to him was necessary before he could be converted into a wrongful holder, or make his possession tortious. He held the lot No. 2, for the heirs of James An-

ders. In this case we see no evidence of any act done by the defendant, amounting to an actual exclusive possession, which could give notice, that he intended to keep out all others, nor any act, amounting to a disclaimer of the right of the heirs of James Anders to the lot. *Love* v. *Edmonson*, 1 Ired. 152. *Murry* v. *Shanklin*, 4 Dev. and Batt, 291.

The defendant had not such a possession as to reduce the title of the heirs of James Anders to a mere right, and the conveyances by them to the plaintiff, were not void, but transferred to him what right was in them. The demand, stated in the case, was sufficient notice to the defendant, and his refusal to deliver possession, made him a wrong-doer.

PER CURIAM. Judgment affirmed.

DAVID KIME *vs.* JOHN T. BROOKS.

The signing, sealing and delivery of a deed by an agent, except where the authority is by an instrument under seal, will only be valid when they are done in the actual presence of the principal.

The case of *Davenport* v. *Sleight*, 2 Dev. & Bat. 381, cited and approved.

Appeal from the Superior Court of Law of Randolph County, at the Fall Term, 1848, his Honor Judge CALDWELL presiding.

This is an action of debt on a bond of one Hamlin and the defendant's testator, and was tried on *non est factum* pleaded. To establish the execution of the bond by the

testator, his daughter was called as a witness and she deposed, that a servant of Hamlin brought a letter to her father, the testator, at his house, inclosing the paper now sued on, which was then signed and sealed by Hamlin, and had a seal for another name, and requesting the testator to sign it, with a view to receive money on it: that her father, by reason of age and infirmity, could not write, and directed her to sign the paper for him; and that for that purpose he laid the paper down on a table in the house, and turned away and went out into the yard, and she then signed his name and delivered it to the servant, who took it away: that at the time she signed the paper, she heard her father conversing with his wife in the yard, and that she did not then see him, nor believe that he could see her; and that no objection was afterwards made by her father to what she had done. The witness further stated, that she had been in the habit of signing her father's name by his directions to Hamlin's notes, and those of other persons.

The Court instructed the jury, that there was such a presence of the testator as would make the signing by the daughter binding on him; and that if the paper was left on the table with the intent that the daughter should hand it to the servant when signed, then her delivering it, as stated by her, was a good delivery, though the testator was in the yard at the time. There was a verdict for the plaintiff, and the defendant appealed from the judgment.

Morehead, for the plaintiff.
Haughton, for the defendant.

Ruffin, C. J. This Court does not concur in the instructions to the jury. The Touchstone 57, states the rule upon which the case depends in a short, but very clear, manner. "Where one person delivers an instrument as

the act of another person, who is present, no deed conferring an authority is requisite. But a person cannot, unless authorised *by deed*, execute an instrument as the act of a person who is absent; and every letter of Attorney must be by deed." The plain meaning of the passage is, that what a person does in the presence of another, in his name and by his direction, is the act of the latter, as if done exclusively in his own person; but that what is done out of his presence, though by his direction and in his name, cannot in law be considered an act in *propria persona*, but one done by authority; and that when the authority is to execute a deed by signing, sealing and delivering it for the party, and, especially, the delivering, it cannot be oral, but must be by deed. There are some instances in modern times, in which Judges have been moved by the hardship and justice of the case to depart in some degree from this rule, though so precise in its terms and so wholesome in its general application. But in this State it has been scrupulously adhered to, when it operated to the prejudice of claims as just in all respects as the present, if not more so. Thus in *Davenport* v. *Sleight*, 2 Dev. & Bat. 381, it was held that an instrument signed and sealed by the defendant in blank and delivered to an agent, with directions to purchase a vessel for the defendant, and fill up the instrument with the price to be agreed on and deliver it, was not a good bond, though the defendant afterwards declared his approbation of what had been done. It would afford admission to too many abuses, especially upon infirm and illiterate persons, to admit parol evidence of an authority to execute and deliver deeds. It has been thought, that it was going further than principle would justify, to allow of a delivery as an escrow, unless the final delivery be authorised by deed. But that seems to stand on firm ground; for the absolute delivery by the party himself rests in the testimony of witnesses, and the

conditional delivery by him may therefore well depend upon the like proof. But when the party himself does no act, but the whole transaction is performed by another in his name and in his absence, the security of titles requires that the authority to act should be by deed, as a permanent evidence of its nature, which cannot so easily be fabricated or misconstrued. The law may well be different with respect to notes and other contracts not under seal; because their operation is generally barred, unless used in a period comparatively short. But deeds are of enduring efficacy, and one, executed like the present, may be set up at any distance of time, when the conditions or circumstances under which it was authorised are incapable of proof. Besides, deeds operate without proof of consideration and *proprio vigore*, while it is otherwise with simple contracts. The Court holds, therefore, that it was indispensable to the validity of this instrument, as a bond, that the party should have been present at its execution and delivery. That he was not present seems evident and certain. The daughter says, she did not, at the time she signed the paper and delivered it, see her father, nor did he or could he see her, as she believes. They could not therefore be said in any just sense to be in each other's presence. The act of the daughter could not be said to be her father's, in that he saw or knew or could know of his own knowledge, that she was in fact doing what he directed her: but it rested in his confidence, that she would pursue his directions, and in her testimony that she did pursue them. The father could know only from her relation and not for himself, what she had done. Therefore it is plain, that her acts were not in his presence. In the execution of wills it has always been held, that, under the statute which requires the attestation of the witnesses in the presence of the testator, the attestation must be at least in the same room with the testator, or, if not, in such a situation as

to be in fact within his sight, as in the case of the lady, who sat in her carriage while the witnesses wrote their names at a window within her view. But here the witness proved and the Court assumed, that the father was not in the room nor in sight of the daughter, when she executed and delivered the instrument; and, if so, he was not present. For if the person cannot see or know for himself, at what distance shall he be said to be present, and at what, absent? There can be no rule but the one that he must be in such a situation as to know what is done, and be able at the instant to control the agent.

PER CURIAM. Judgment reversed and *venire de novo*.

JOHN HOLDFAST vs. WILLIAM B. SHEPARD.

Where a recovery in ejectment is effected on the demises of two only out of several tenants, and afterwards is brought for mesne profits, none but the shares of such mesne profits to which those two tenants are entitled can be recovered.

And it makes no difference whether the action for the mesne profits be brought in the name of the fictitious lessee or of his lessors.

The case of *Holdfast* v. *Shepard*, 6 Ire. 361, cited and approved.

Appeal from the Superior Court of Law of Pasquotank County, at the Spring Term, 1848, his Honor Judge Settle presiding.

The action is trespass for *mesne* profits, brought in the name of the plaintiff in ejectment, after his lessors were put into possession under a *habere facias possessionem* from this Court in the case reported 6 Ired. 361. The judgment was there given on the first count, which was

on the demise of two persons, who were with others the heirs at law of Jeremiah M. King, from whom the land descended. The demise was of the whole of the premises and the verdict was a general one of guilty. The present action is brought at the instance of the two persons, on whose demise the recovery in ejectment was made. On the trial the defendant moved the Court to instruct the jury, that they could find only such aliquot parts of the rent and damages, as those two persons were entitled to, as some of the heirs of King. But the Court refused to give the instruction prayed for; and directed the jury to assess the damages to the whole value of the profits from the day of the demise, to that of the plaintiff's lessors going into possession. From a verdict and judgment accordingly the defendant appealed.

Iredell, for the plaintiff.
J. H. Bryan, for the defendant.

Ruffin, J. C. The Court thinks the law was not correctly laid down to the jury. It is certainly most proper and generally best answers the purposes of justice, that the verdict should specially state the interest of the lessors of the plaintiff, when these are several, or when only some of the tenants in common bring the suit. But as the party may not be prepared always to show his particular share, and the defendant is guilty, if he hath ejected the plaintiff from any part of the land, to which he was entitled under the lease, it has become a practice to render the verdict in a general form, even when the whole of the premises is demanded. The reason is, that the Court deems the action fictitious to many purposes, and therefore keeps it under its control, and will, in a summary way, correct any abuses committed under color of such general demise and verdict. Hence it has been commonly said in such cases, that the lessors

of the plaintiff take possession at their peril. Upon that ground it was, that the judgment was affirmed in the suit between these parties, as was then stated; and in so holding, the Court only followed previous cases. In *Cottingham* v. *King*, 1 Bur. 629, Lord MANSFIELD mentioned, that in the fictitious action of ejectment, the plaintiff is to show the sheriff and to take possession, at his peril, of only what he has title to; and if he take more than he recovered or showed title to, the Court will in a summary way set it right. He said the same in substance in *Connor* v. *West*, 5 Bur 2674; and in *Roe* v. *Dawson*, 3 Wils. 49, the defendant was restored to certain shares, to which the lessors of the plaintiff had not entitled themselves. There can be no doubt, then, if the sheriff in this case turned out the defendant from the premises altogether, and put two lessors of the plaintiff into possession of more than their shares, that he did wrong, and the Court upon application would order restitution; for the recovery of one tenant in common is not a recovery for all of them, and does not entitle him to take possession for all. That is clear from the fact, that one tenant in common may recover from another in this general form and may then bring his action for *mesne* profits. *Cutting* v. *Derby*, 2 Wm. Bl. 1077. Indeed, one of the tenants in common may be barred of his entry by the statute of limitations and the other not, because as here, she was a *feme covert*. A person thus entitled to but a share is let in according to his title. How the fact in this case is, does not distinctly appear. If the parties only entered according to their title, they certainly cannot recover in respect of the shares of which the defendant remains in actual possession. But we rather understand the case to be, that the defendant was put out altogether. Even in that case, however, we hold that no more than the shares of the parties, who brought the former and present actions, can be recovered; for properly they are in

only of their own shares, and the possession of the other undivided parts is, by legal intendment, either in the other heirs of King or the present defendant. If in the latter, then plainly the action will not lie in respect to those parts; and if in the former, they may still sue for their shares of the profits and the defendant could not plead in abatement to their suit, after having omitted to do so in the present. Taking the case, then, any way, the recovery ought to be for only the proportion of the profits, which belong to these parties as some of the owners. The manner of bringing the action in the name of *Holdfast* can make no difference; for he can have no better right than his lessors had.

There was also a question made upon the statute of limitations; but the facts appear so imperfectly in the transcript sent here, as not to be entirely understood; and therefore nothing can be said on it.

Per Curiam. Judgment reversed and *venire de novo*.

DEN EX DEM HARRIS S. PHELPS *vs.* JOSEPH B. LONG.

Where a person, already in possession of land, takes a lease from another, and holds over after his term has expired, whether this is a case coming within the provisions of the Act, Rev. St. Ch. 31, Sec. 51, requiring bonds from tenants refusing to surrender possession, &c. *Quere?*

But in all cases where the landlord wishes to avail himself of the provisions of that Act, he not only must state the lease and that the term has expired, but he must also set forth in his affidavit explicitly or in such a manner that the Court may necessarily or fairly draw the inference, that the tenant, after the term expired, had *refused* to surrender the possession.

What notice to quit from a landlord to a tenant is required in this State. *Quere?*

Where a person was sued as casual ejector and the Court improperly refused him permission to plead, upon the ground that he was a tenant holding over and therefore bound to give a bond as required by the Act, Rev. Stat. Ch. 31, Sec. 51, when it did not appear that he had refused to deliver possession, and thereupon entered judgment by default against them. *Held*, that he was entitled to an appeal.

Appeal from the Superior Court of Law of Washington County, at the Fall Term, 1848, his Honor Judge BAILEY presiding.

The declaration is entitled of September Term 1848, and was served on Long, as the tenant in possession, the 24th of August of that year. The demise is laid as of the 10th of February, 1844. At September Term, Long applied to be admitted as defendant, offering to give bail and enter into the common rule, and plead not guilty. But the counsel for the plaintiff objected to his being allowed to plead; and in support of the objection he filed the affidavit of the lessor of the plaintiff, in which he stated, "that in the year 1839, Joseph Long proposed to rent of him the tract of land, which the affiant had bought of John Chesson, and on which the said Long

then lived, being the premises described in the declaration: that they agreed upon the sum of $25 per annum, and Long gave his note for the amount, which he paid in 1840: that he continued in possession in 1841, and gave his note for the like amount and continued to occupy it, and gave notes for the rent in 1841 and 1842; and, that in August 1843, affiant gave notice to said Long to quit possession and to stop the tenancy." Thereupon the Court ordered, that Long should not plead unless he gave a bond with sufficient penalty and sureties, with condidition, that he would pay the lessor of the plaintiff all such costs and damages as should be recovered in the suit; and, Long declining to give such bond, judgment final was rendered against the casual ejector, and Long appealed.

W. H. N. Smith, for the plaintiff, submitted the following argument:

It is submitted that the Act, in pursuance of which this judgment was rendered, is intended to embrace all cases, where the relations of landlord and tenant exist. It provides a remedy for the former against the latter, holding over after the expiration of their term. Whenever, therefore, this relation has been established, and the term has expired, this proceeding is authorised on affidavit made by the lessor.

The affidavits in this case prove the relation to have existed and to be determined. The contract stated therein creates the relation of landlord and tenant between the parties with all the rights and duties, as well as remedies, incident to it. Thenceforth, whatever may have been the character of the previous possession that possession is changed into a tenancy, and the party, though holding adversely before, by his own Act, becomes the tenant, holding under the title of his lessor. *Clapp* v. *Cope*, 1 D. & B. Eq. 177.

If a literal construction be given to the Act, and is so made to include only the case of one not in possession, entering, then the remedy would be entirely inadequate to the mischief.

In this view of the case, one of two results would follow:

Either, no such relations as are contemplated by the Act *could take place* between the proprietor of land, and one actually in possession.

Or, the party in possession must abandon his "*possessio pedis*," retire from the land, and for no other end, than forthwith to return, to make a new *actual entry*.

Such a construction, given to the act, would greatly cripple its beneficial operation, or require an act to be done, unmeaning and useless in the extreme.

But such a tenant as the defendant here, it is insisted, did, in legal contemplation, enter as such, into possession. There was an intervening point of time at which the change occurred.

The previous possession was totally different from that subsequently acquired by the contract. And he may, with strict propriety, be said to have ENTERED into possession as tenant, when, abandoning the former, he *enters* into the new relations which change its character. Just as effectually does he enter upon his term, as if being out of possession, he had, by virtue thereof, entered into possession for the first time.

2nd. It is submitted also, whether the party in possession of the land, and upon whom the notice was served, not having been made a party to this suit, because in the judgment of the Court, he had not complied with the necessary preliminaries enjoined in the Act, *can appeal* from a judgment by default.

Not being permitted by the Court to defend nor being a party to the judgment, it is submitted whether he can

appeal, and whether the appeal must not be dismissed.

Heath, for the defendant.

RUFFIN, C. J. The point is, whether this is a case within the Act of 1823, *Rev. St. ch.* 31, *sec.* 51. It provides, that the tenant in possession shall not be entitled to plead, unless he give a bond as required in this case, but that there shall be judgment against the casual ejector, if the lessor of the plaintiff shall file an affidavit at the first term, that the tenant in possession entered into the premises as his tenant, and that his term therein has expired, and that the tenant refuses to surrender the possession of the premises to the lessor of the plaintiff, with the privilege to the tenant of offering counter affidavits.

One question on the Act is, whether the acceptance of a lease by one already in possession is within it: as if the owner of land sell it, and, without going out of possession, takes a lease from his vendee; or if a tenant under one person takes a new lease from the assignee of the reversion. Literally, the Act is confined to the case, in which the entry was at first under the lessor of the plaintiff. No doubt, the reason is, that each of those persons has a precise knowledge of the contract, thus made by himself personally; so that neither can be under a mistake as to his rights or those of the other party. Therefore holding over against the demand of the lessor must be in bad faith on the part of the tenant, and he ought not to hinder the land-lord's remedy to regain the possession without securing the rent, damages for waste and costs. Though that principle may not, more than the letter of the act, take in the case of an assignment of the reversion, yet when one, though before in as owner or as lessee of another, takes a lease from his alienee or a new lease from the assigner of the reversion, it seems substantially to fall so entirely within the mischief, against which the act is directed, as to be within its fair construction. For it

would be very idle, that the tenant should go out for an instant, and then return, for the sake of creating such a tenancy as would, under the act, tend to prevent the tenant from holding over. The Court, therefore, inclines strongly to the opinion, that the bond might have been required from Long, notwithstanding he did not go into possession under a lease from Phelps, but only continued in possession under a lease granted by him after he became owner of the land. Yet the points need not be now adjudged, as it is not necessary to the decision of this case, in as much as the Court holds the affidavit insufficient by reason of defects in other essential points.

The act does not give this security to a landlord, when the tenant merely holds on, but only when he refuses to surrender the premises to the lessor after his term therein expired. The lessor of the plaintiff must therefore establish the two further facts, that the term has expired, and that still the tenant refuses to deliver up the possession. The affidavit here contains no such statement in either respect. Perhaps it ought to be required to say so in terms. At all events, the statements in it should be such, that the Court would be obliged to infer those facts by a fair, if not a necessary, construction. For the Court ought not to require a bond to secure the rent and damages in any case, in which the jury would be unable, upon evidence to the same facts, to give them, according to the subsequent provisions of the act. Those provisions are, that in such cases the jury shall enquire, whether the defendant refused to surrender the premises after his term therein had expired, and, if they find affirmatively on those points, then they are to assess the damages, including the value of the occupation from the expiration of the term and damages for waste during the holding over; for which there is to be a summary judgment given on the bond. Very clearly, then, those facts ought distinctly and affirmatively to appear on the affidavit. Here they do

not; nor can they be reasonably implied. Certainly, holding over merely will not amount to a refusal to surrender the premises; for the assent of the landlord may be presumed, unless the contrary appear. There must be an express refusal, or a demand of possession, or something else that will turn the tenant into a trespasser. According to the words of the Act, the jury must find that the party "*refused* to surrender the premises *after* his term expired;" which would seem to imply a demand and refusal at the expiration of the term, or so soon afterwards as to rebut an implication of the acquiescence of the landlord. And this must certainly be so, when the term is for a definite period, and, therefore, no notice is necessary to determine the tenancy; for in such a case, if possession be not demanded at the end of the term, or an explicit declaration made before hand to the tenant, that the landlord will require him to go out at the expiration of the term, there will be nothing to give to the holding over the character of a refusal on the part of the tenant to restore the possession, but by such holding over he becomes tenant from year to year. It may be admitted, that, if the lease here were definitely for the year 1843, the notice to quit, given in August, might be a sufficient demand of the possession at the end of that year, so as to be evidence, that the subsequent holding over amounted to a refusal of the demand. But that is not the nature of the lease, as stated in the affidavit. It is explicit only in setting forth a letting in 1839 at an annual rent of of $25; and that under it the defendant occupied until 1843, giving notes in 1839, 1840, 1841, and 1842, respectively for a year's rent, and subsequently paying them. It does not specify at what period of the year the contract was made; nor any definite term, either as to its beginning or ending. Then, it was plainly a tenancy from year to year; but from what day the year was to be reckoned, no one can say upon the face of the affidavit. Now, if it be admitted, that, in a tenancy

from year to year, there need be no demand of the possession distinct from the notice to quit, and so we suppose the law to be; yet clearly, we think, that effect can only be allowed to such a notice as is valid and effectual to determine the tenancy. Here the notice was given sometime in August 1843; and it is impossible to say that it was due notice. It has not been directly decided in this State, as far as we are aware, whatis the proper notice; and it may be possible, that less than the half year, required in England, may be deemed reasonable, or that different periods may be adopted according to the situation of the premises, the interests of agriculture, or the seasons at which the terms may expire. The Court gives no opinion on those points, farther than to say, that it is at least prudent to be on the safe side by giving a half year's notice. But there must, at all events, be some reasonable notice in such cases from the landlord to the tenant, or *vice versa*, to prevent mutual disappointment and loss. Now as it does not appear on what day in August 1843 the notice was given, nor when the current year would be out—that is, at the end of 1843, or at an earlier or later day—it is impossible to determine, whether the notice was for half a year or any other period in particular. Consequently the Court could not determine, that it was reasonable, so as to put an end to the tenancy or convert the lessee into a trespasser, and make his continuing in possession until February 10th, 1844. evidence of a refusal to surrender the premises after his term had expired. It is to avoid the danger of the Court's acting upon vague conjectures on those points, that the Act requires that the lessor of the plaintiff shall swear distinctly, that the term had expired, and that after such expiration the tenant refused to deliver up the possession. Nothing less ought to be deemed sufficient, to preclude the person in possession from the common right of defence. The tenant might have held over upon a

fair claim of right, to go out; whereas the case within the purview of the Act is that of a wilful wrong by the tenant, in withholding from the landlord his land, after a lawful demand of the possession.

It was suggested at the bar, that Long could not appeal, as he had been admitted to defend, and, therefore, was not a party to the record. But the Court holds otherwise. It may be true, if the tenant does not appear, and apply to be admitted as defendant, that he cannot bring error or have an appeal; which are rights belonging to parties and privies. But even in that case the tenant's rights are noticed so far that, upon his subsequent application, the judgment against the casual ejector will be set aside for irregularity, and a writ of restitution awarded. But when he appears, it is of common right he should be admitted to defend upon the usual terms; and if that be refused to him, undoubtedly, it is an error, which he may have corrected by a higher Court. So it is here; for, although the Statute authorises the imposition of other terms in certain cases, this is not one of them; and therefore the tenant had a right to be heard before being deprived of his possession, and to be heard upon giving bail and entering into the common rule, according to the course of the Court.

The judgment against the casual ejector was, therefore, erroneous, and is reversed; and the case is remitted to the Superior Court to proceed farther therein according to law and right.

Per Curiam. Ordered accordingly.

DEN ON DEMISE OF WILLIAM JORDAN vs. ROBERT MARSH.

A., by virtue of an order of the County Court, founded on a judgment before a justice and an execution thereon levied on the 8th of March, 1842, issued a *venditioni exponas*, bearing teste of May Term, 1842, under which the land of B. was sold and A. became the purchaser: C. issued a *venditioni exponas* tested of May Term 1842, pursuing a *fi. fa.* tested of February Term 1842, under which the same land of B. was sold and, D. became the purchaser, and having effected a recovery in ejectment was about to turn B. out of possession, when B. accepted a lease from D. and continued in possession. *Held*, that, in an action of ejectment by A. against B, although D. who had been admitted to defend as landlord could make no defence which B. could not have made, yet B. himself might have given in evidence these circumstances to rebut A.'s claim to recover, by shewing D.'s title to be paramount to A.'s and that he (B.) was D.'s tenant.

Appeal from the Superior Court of Law of Chatham County, at the Spring Term 1847, his Honor Judge MANLY presiding.

In this action of ejectment, the following bill of exceptions was sent up by the Judge of the Superior Court.

On the trial of the issues joined, the counsel for the plaintiff produced and gave in evidence, in support of the said issue on the part of the plaintiff, the record of a judgment in the Court of Pleas and Quarter Sessions, whereby it appeared, that one John Edwards obtained, before the 8th day of March, 1842, a judgment before a justice of the peace of Chatham against Alfred Fleming, upon whom the declaration was served; that an execution duly issued thereon, and, for want of goods and chattels to satisfy the same, was duly levied upon the premises in the said declaration mentioned on the said 8th day of March, 1842; that the said execution and levy with the warrant and other papers relating thereto, were duly re-

turned to the said Court of Pleas and Quarter Sessions at its May Sessions thereafter, and that such proceedings were had in the said Court afterwards, to-wit: at February Sessions 1843, that the judgment of the justice was confirmed, and an order duly made for the sale of the premises, so levied upon; that a *venditioni exponas* issued thereupon, returnable to the May Sessions following, and the said premises were sold on the 9th of May to the said William Jordan, the lessor of the plaintiff; and the plaintiff's counsel, in further support of the said issue on his part, produced and gave in evidence to the jury a deed, duly executed by the sheriff, conveying the premises to the said William Jordan, and proved, that, at and before the service upon the said Fleming of the said declaration, he was in the possession of the said premises. And thereupon the counsel for the defendant, in support of the said issue on his part, offered to prove, that at the February Sessions 1842, of the said Court of Pleas and Quarter Sessions, one Amos Brewer duly obtained a judgment against the said Alfred Fleming, and duly caused to be issued thereupon an execution, called a *fieri facias*, tested of the said February Sessions, and returnable at the May Sessions thereafter; that the said execution was duly returned at the said May Sessions; that a part of the moneys specified therein only had been made; that an *alias* execution was thereupon issued from the said May Sessions, returnable to the August Sessions thereafter; and that the sheriff, under the same, duly sold the said premises on the 2nd Monday of July following, and that at the said sale, the defendant became the purchaser; that the said *alias* execution was duly returned, and a deed made by the sheriff to the defendant for the said premises; that the said Alfred Fleming, refusing to surrender the possession, the defendant afterwards, to-wit, on the 19th of day of January, 1844, brought an action of ejectment against the said Fleming in the said Court of

Pleas and Quarter Sessions to recover the same: that the said Fleming appeared and was made defendant in the said suit, and pleaded not guilty; and that afterwards, at February Sessions 1845, a judgment was duly rendered against the said Fleming for the recovery of the possession of the said premises. And the counsel for the defendant further offered, in support of the said issue on his part, to prove, that afterwards, when the said defendant was entitled to have a writ of possession against the said Fleming on the said judgment, and before issuing out the same, the said Fleming agreed to become the tenant of the premises under the said defendant, and accordingly did on the 10th of March, 1845, accept a written lease from the defendant until the 9th of October next thereafter, and gave his note for the rent, and a bond, conditional for the surrender of the premises to the defendant, at the expiration of his term. And the defendant's counsel prayed the judge to admit and allow the said matters to be proved and given in evidence to the jury, as relevant and competent to maintain the said issue on the part of the defendant. But the plaintiff's counsel objected to the said evidence and insisted, that the defendant, having been admitted a defendant in the room and stead of the said Fleming, and as his landlord to defend his possession, was not entitled to the benefit of any evidence, which should not in law be admissible on the part of the said Fleming, had he been the party to the said issue: And that in law the said Fleming could not offer such evidence in support of such issue; and the Judge being of opinion with the plaintiff's counsel, refused to allow the matters so offered, on the part of the defendant, to be proved and submitted to the jury, to which opinion and refusal, the defendant by his counsel excepted, and thereupon the Judge, at the request of the defendant's counsel, hath set his hand and seal to this bill of exceptions, containing the said matters, and it is or-

dered to be annexed to the said record, this 3rd Monday of March, A. D. 1847, at the Court House of the said County.

There was a verdict for the plaintiff and from the judgment thereon the defendant appealed.

Waddell and *J. H. Haughton*, for the plaintiff.

Badger, *G. W. Haywood* and *W. H. Haywood* for the defendant.

PEARSON, J. The bill of exceptions presents two questions; was Marsh, who, by order of the Court, was substituted and made defendant in the room and stead of Fleming, entitled to the benefit of any evidence, which would not in law be admissible, on the part of the said Fleming? It is not necessary to decide this question, because we think there was error in the decision of the second question, and it is sufficient to say, that we see nothing to take this case out of the general rule, that a landlord, who is admitted to defend, is confined to such defence as the tenant could have made.

The second question is: was the defendant, supposing him to be confined to such defence as Fleming was in law allowed to make, entitled in law to rely upon the matters on his part to support the issue? We fully recognise the correctness of the general rule, that a purchaser at a sheriff's sale is entitled to recover in ejectment against the debtor, whose estate he has bought, upon showing a judgment, an execution sale, and sheriff's deed in pursuance thereof. For having paid his money in satisfaction of the defendant's debt, he is entitled to whatever estate the defendant owned, and to the possession which he had, and it is right that he should be put into possession, without any contest with the defendant as to the title.

We can, however, see no reason, why, in the case under consideration, Fleming, who had taken a lease and thereby in effect acquired a new possession under a third person, who had brought an action of ejectment and was to turn him out of possession after the purchase by the lessee of the plaintiff, should not be allowed to make defence, by showing that the person, under whom he acquired the new possession, had a paramount legal title. If he had been put out of possession, and then accepted a lease and entered in pursuance thereof, it would be clear that he could make such defence. For what end, should he be required to go through the useless form of being put out of possession, merely to be at the trouble of going back again?

A lessee for years, or other particular estate, during the continuance of the estate and while he holds the possession acquired under it, is not allowed to dispute the lessor's title. After the expiration of the estate, he must give up the possession to him of whom he got it, before he is at liberty to set up title in himself. When he has done so, he may assert title, either one which existed before he accepted the estate and possession, or one subsequently acquired; but he cannot do so before, on account of the privity of estate. It would be treachery and bad faith to attempt to withhold possession from him of whom he received it.

There is no reason for applying this doctrine in its fullest extent to a debtor in possession of land sold at Sheriff's sale. He is not the tenant of the purchaser—there is no privity of estate—nor did he receive the possession from him. The rights of the purchaser are sufficiently secured by holding, that he acquired whatever estate the debtor owned and has a right to the possession which he had at the time of the sale. As long as matters remain in *statu quo*, the debtor's possession is not adverse, but there is no treachery or bad faith in his acquiring a new possession

under a paramount title in the manner, offered to be proved by the defendant in this case.

PER CURIAM. Judgment reversed and *venire de novo*.

THOMAS BELL *vs.* WILLIAM CLARK & AL.

In an issue of *devisavit vel non* where the subscribing witnesses to the supposed will disagree as to the capacity of the supposed testator, other proof may be given as to that fact and the jury must decide upon the whole evidence.

The cases of *Crowell* v. *Kirk*, 3 Dev. 355, *Holloway* v. *Lawrence*, 1 Hawk. 49, and *Clary* v. *Clary*, 2 Ired. 78, cited and approved.

Appeal from the Superior Court of Law of Chatham County, at the Fall Term, 1848, his Honor Judge CALDWELL presiding.

This was an issue of *devisavit vel non*, as to an instrument dated November 28th, 1843, and propounded as the will of Elijah Bell. It had two subscribing witnesses, and they were both examined. One of them, Lassiter, deposed that he was sent for by the deceased to write his will, but that he was unable to do so, because he had the rheumatism, and that the deceased then requested his brother, Thomas Bell, to write it and he did so: that he, the witness, was present when the will was written, and thought the testator had understanding and capacity to make a will: that he was, however, drinking during the time, and became a good deal intoxicated, but that he knew what he was doing, and dictated the dispositions of

property contained in the will: that after it was written it was read over to the deceased and approved and executed by him, and at his request then attested by himself and the other witness: that the deceased then handed the paper to this witness to keep, and that he kept it in his possession until April 1847, when one Farrar brought him a message from the deceased, requesting him to carry the will to him: that he accordingly did so, and that the deceased asked that it should be read to him, which the witness did in the presence of Farrar: and that the deceased then said he was satisfied with it, and directed that it should be put into his desk, which was done, and that it was found there upon the death of the party in June following.

The other subscribing witness, Neal, deposed, that on the day the will bears date, he went to the house of the deceased for the purpose of collecting money from him, as a constable, and the deceased requested him to witness a paper, which he acknowledged; and that he did so without knowing the character of the paper, though he suspected that it was a will; and that Thomas Bell and the witness were present. He further stated, that the deceased was drinking at the time and considerably intoxicated, and in his opinion was not capable of transacting business generally.

Farrar testified, that he was a neighbour of the deceased, and that in April 1847, the deceased was sick and sent for him, and that he went and stayed with him two or three days; that the deceased was then perfectly sober, not having drank any spirits for several weeks: that he requested the witness to call on Lassiter and ask him to bring him his will; and that he did so and Lassiter immediately brought it: that it was then read by Lassiter to the deceased in the presence of the witness, and he said it was his will and that he was satisfied with it, and directed that it should be put into his desk; that the

deceased was then of sound mind, and died in June thereafter.

A physician deposed, that he attended the deceased six or seven days before he died: that he was then rational, and told over to him the contents of his will, which corresponded with it, when he heard it read after his death.

Another witness stated, that he lived with the deceased in 1844; when drinking, he frequently spoke of his will, and told the witness its contents and they corresponded with the will as read on the trial.

Another witness deposed, that the deceased told him before the will was made, that he intended making one, and that about three weeks after it was made, the deceased told over its provisions to him, and that he was rational at the time of those conversations.

The deceased was unmarried and had no children, and, after giving away parts of his property to several collateral relations, he gave the bulk of it to his brother, Thomas Bell, whom he made residuary legatee and executor, and who is the propounder.

The counsel for the caveators contended, that unless both of the subscribing witnesses testified to the capacity of the deceased, the paper was not well proved; and that the subsequent declarations and conduct of the deceased were not sufficient, within the provision of the statute requiring two witnesses to a will. But the Court was of a different opinion, and instructed the jury, that if they found upon the whole evidence, that the deceased was of sound mind and memory at the time he executed the paper, they ought to find for the paper as a good will. The jury gave a verdict in favor of the will; and from the judgment accordingly the caveators appealed.

McRae, for the plaintiff.

Waddell, J H. Bryan and *J. H. Haughton*, for the defendants, who relied upon the following authorities, *Blount* v. *Patton*, 2 Hawks. 239, *Rugland* v. *Huntingdon*, 1 Ired. 561, and *Bacon's Abridg.* 5 Vol. 510.

Ruffin, C. J. The Court thinks that the judgment ought to be affirmed. The law makes two subscribing witnesses to a will indispensable to its formal execution. But its validity does not depend solely upon the testimony of those witnesses. If their memory fail, so that they forget their attestation, or they be so wanting in integrity as wilfully to deny it, the will ought not to be lost, but its due execution and attestation should be found on other credible evidence. The leading case on this point is that of *Lowe* v. *Joliffe*, 1 Bl. Rep. 365; which was a remarkable one, and fully establishes this position. It has never, we believe, been questioned, but has been always spoken of with approbation. In *Jackson* v. *Christman*, 4 Wend. 277, it was laid down as undoubted law, that if the subscribing witnesses all swear, that the will was not duly executed, yet it may be supported by other witnesses or circumstances. In this Court *Lowe* v. *Joliffe* has been always understood to be law. *Crowell* v. *Kirk*, 3 Dev. 355. For, although the law requires all the witnesses to be called, if within the jurisdiction, it would be most unreasonable to conclude the party calling them, as to the execution of a will more than in respect to any other instrument. The obligee must call the subscribing witness to a bond; but as his testimony, that it was executed, does not conclusively prove it, so his denial of his attestation or of the execution by the obligor does not absolutely destroy it, but the parties may give other evidence, that it was or was not duly executed. *Holloway* v. *Lawrence*, 1 Hawks. 40. 1 *Phil. Ev.* 475, and the cases cited. The same reason applies to a will with even more force. As was said in

Crowell v. *Kirk*, the subscribing witness to a will is rather the witness of the law than of the party calling him, and therefore the party is not bound to take his testimony as true, but ought to be at liberty to contradict and discredit him. It is impossible the Legislature should mean, that one of the most solemn acts of a man's life should be defeated by the perjury of one man, or, indeed, any number of men; and much less by his defect of memory or of a discrimination to judge correctly of the party's strength of understanding. For as it is in respect of the fact of execution, so it must be in respect to the capacity of the party deceased, whether the defect be alleged to arise from insanity or the less permanent cause of intoxication. The jury are not confined to the opinions given by the subscribing witnesses on that point, nor to the facts on which they say they formed their opinions, but may take their judgment from other sources on which they rely more. Here the subscribing witnesses concurred in the facts, which go to make up what is called the execution; but they differed as to the degree of intoxication and of its effects on the party's mind and memory. The weight due to their respective opinions must depend on their intelligence and the opportunities they had of knowing how far the party's faculties were ordinarily overcome by intoxication, and, particularly, the actual effects at the time of executing this instrument. Perhaps the jury might well have decided as they did, on the comparison in those respects of the two witnesses. But, at all events, when they thus differed, it must have been proper to let the jury see by other means, that in fact the party had a disposing memory and knew what he was about, and that he was only fulfilling a previous promise; and that of what he did, he was so conscious and had such a perfect recollection, that he was able at different times for several years afterwards, both when sober and when drinking, to recite correctly the

provisions of the paper. It is not uncommon that subscribing witnesses should not agree entirely in opinion as to the capacity of the party deceased, or as to the facts upon which they found their opinion; and in such cases it is certainly reasonable, that either side should show, either by collateral circumstances or by direct proof, that one of them is more credible than the other, or that one of them is mistaken in his facts and the other not. *Clary* v. *Clary*, 2 Ire. 78.

PER CURIAM. Judgment affirmed.

ATLAS J. DARGAN *vs.* JAMES W. WADDILL.

A stable in a town is not, like a slaughter pen or a hog style, necessarily or *prima facie* a nuisance. But if it be so built, so kept, or so used, as to destroy the comfort of persons owning and occupying adjoining premises and impairing their value as places of habitation, it does thereby become a nuisance.

If the adjacent proprietors be annoyed by it in any manner, which could be avoided, it becomes an actionable nuisance, though a stable in itself be a convenient and lawful erection.

Appeal from the Superior Court of Law of Anson County, at the Fall Term, 1848, his Honor Judge PEARSON presiding.

This was in case for erecting stables so near the dwelling house of the plaintiff, as, by the noise of the horses and the smell of the litter, &c., to render the plaintiff's house uncomfortable to live in, and thereby much impair its value. The plaintiff proved that his wife, then Mrs. Bates, about the year 1839, purchased a dwelling house and lot, situate on one of the main streets in Wadesboro',

and being the north-west corner lot, of the square immediately west of the Court House. The square, commencing on the street in front of the Court House, runs 120 yards on Wade street, and 140 yards South on Green Street, and the plaintiff's lot had a front of 40 yards on Wade Street, and extended back about 70 yards. The dwelling house, purchased by the plaintiff's wife, fronted on Wade Street, and had been erected and used for a dwelling for thirty years or more. Mrs. Bates had the house moved some five or six yards back, so as to have a small front yard; and refitted it and made some additions.

The defendant, in 1841, purchased the house and lot situate immediately opposite the Court House, and being the North-east corner lot of the square above described. It extended 40 yards on Wade Street and 70 yards on Green Street. The defendant refitted and made many additions to the house, so as to fit it for an Hotel.

The lot, between the plaintiff's and the defendant's lots, which was 40 yards on Wade Street and extended back 70 yards, had several small buildings on it in front, which had been used as store-houses and shops for Mechanics, and in the rear there was a small stable, fit for one or two horses, which had been used for some fifteen years, without a plank floor. In 1841, the defendant purchased this middle lot, removed the small houses in front, with a design of using the lot by erecting a stable suitable for his Hotel. Mrs. Bates notified the defendant of her objections to his putting stables so near her dwelling, but the defendant, notwithstanding, erected a large frame stable at the South-west corner of the lot, fifty feet long and wide enough for two rows of stable. The stable was within three feet of the line along side of the plaintiff's garden, and near a small stable and privy of the plaintiff. The distance from the back piazza of the plaintiff's dwelling to the nearest corner of the stable was 33 yards. The balance of the lot the defendant used as a stable or horse

lot, and also built upon it a small log stable fit for two horses between the large stable and the plaintiff's dwelling, the nearest corner being about 12 yards from the plaintiff's piazza, near his kitchen and smoke house.

The plaintiff married Mrs. Bates in 1841, and resided afterwards with her in the said dwelling house. The defendant's stable was completed and put in use on the 1st of March. The large stable had a plank floor, and could hold fifty horses. It was proved, that the noise from the tramping of the horses, particularly on public occasions, could be heard by all residing on this square, and the adjoining squares night and day, and rendered the dwelling house of the plaintiff uncomfortable and disagreeable, and that Mrs. Dargan, who was a nervous lady, and in delicate health, was very much annoyed by it. Some evidence was offered tending to show, that, before the writ issued, a disagreeable smell, arising from the defendants stables, could be perceived in the house of the plaintiff in damp weather, when the wind was blowing from the South to the house, and that, although the defendant had a privy on his other lot, many persons used the stable for that purpose. Some evidence was offered tending to show, that, before the writ issued, the defendant kept a stallion in the small stable, but not until the last of the summer, if at all, until after the writ issued. The witnesses considered the value of the plaintiff's house, as a dwelling, impaired by the erection of the stables so near to it.

The Court charged, that a stable, like a kitchen or a privy, being a necessary appendage to an hotel, the defendant, in the reasonable exercise of his rights, was at liberty to erect the stables, taking the evidence, as to the location of the several buildings, to be true, provided he did so in such a manner as to cause no unnecessary damage to the plaintiff. A man is not required to forego the reasonable use of his own, although by using it, he

does damage to his neighbor to some extent. It is damage *absque injuria*. A stable differs from a slaughter-pen, tan-yard, or hog-pen, because the latter are unnecessary and unfit for towns, and should be put in remote and out-of-the-way places. If the defendant, before the writ issued, by neglecting to have his stables cleansed at proper times, had suffered the filth to accumulate and become noisome, the plaintiff would be entitled to recover. So, the defendant had no right to use the little stable, which was so near the plaintiff's dwelling, as a stand for his stallion, and if he did so, before this writ was issued, the plaintiff would be entitled to a verdict.

Verdict for defendant. Motion for new trial for error in the charge, which was refused. Judgment, and the plaintiff appealed to the Supreme Court.

Strange, for the plaintiff.

P. H. Winston and *Iredell*, for the defendant.

Ruffin, C. J. It was, we think, a fair inference for the jury from the instructions, as a whole, that the defendant's stable was not a nuisance to the plaintiff, because the act of the defendant in building it was but a reasonable use of his own in erecting an useful appendage to his Hotel, and therefore the damage to the plaintiff was not unnecessary. Thus regarded, the Court does not concur in the instruction. It is true, that a stable in a town is not, like a slaughter house or a sty, necessarily and *prima facie* a nuisance. There must be places in towns for keeping the horses of the people living in them or resorting thither; and if they do not annoy others, they are both harmless and useful erections. But, on the contrary, if they be so built, so kept, or so used as to destroy the comfort of persons owning and occupying adjoining premises and impair their value as places of habitation, stables do thereby become nuisances. They are

not necessarily so; but they may become so, and we think that of the defendant was in fact so. Therefore the instructions, as applied to this particular case, were calculated, we think, to mislead the jury. In respect to the filth and smells which might or did arise from it, the Court entirely concurs with the directions to the jury; and we suppose the jury must have thought, that no serious inconvenience was sustained by the plaintiff's family from that cause. For in that respect a stable may be likened to a privy, which decency and convenience render indispensable. But the proprietor cannot protect himself under that plea, if by neglecting to cleanse it, he allows it to become offensive in the adjacent houses or grounds. So care must be taken to prevent a stable from incommoding the neighbors, from the ordure deposited in it. But if the adjacent proprietors be annoyed by it in any other manner, which could be avoided, it in like manner becomes an actionable nuisance, though in itself a stable be a convenient and lawful erection. This stable, it appears, was a wooden building, with a plank floor so constructed, that the stamping of the horses on it created such a noise day and night as could be heard, not only throughout the square on which it and the plaintiff's house were situated, but on all the adjoining squares, and, in the opinion of the witnesses, impaired the value of the plaintiff's house as a dwelling. That, we think, amounts in law to such a disturbance and annoyance as to be an actionable nuisance. In *Bradley* v. *Gill*, 1 Lut. 69, it was held that building a smith's forge so near another's house and making such noises with the hammers, that the owners could not sleep, was a nuisance, for which an action would lie; for though the trade of a smith be a necessary one, it must be carried on so as not to injure others in the neighbourhood. That case is cited and approved by Chief Baron Comyns. *Com. Dig. Action on the case for a nuisance, A*; and, indeed, the principle is in itself so rea-

sonable that every one must admit it. If that be true of a black smith's shop, because the noise of the hammers at unseasonable times deprived a person of his rest, it must be much worse from the stamping of fifty horses on boards laid on sleepers, so as to make a loud sound. It is obvious, that the effect complained of must have arisen from the structure of the building. The defendant might have built his stable with an earthen floor, and thus avoided this annoyance. If it be said, that probably a greater evil might have arisen, from the greater difficulty of cleansing the stable, the answer is, that the defendant had his choice, at his risk; for, in truth, he had no right to erect a nuisance in either way, whether by noisome smells or disturbing noises. He cannot excuse one nuisance by urging, that, if not committed in that form, it might have been worse, in another. But, in reality, neither was unavoidable. For, if the situation was such that the horses ought not to stand on the ground, the defendant might have paved the floor, or laid the boards on the earth, or used such as were so thick as not to sound under the hoofs of the horses so loud as to disturb or destroy the repose of the neighboring inhabitants and thereby lessen the value of their property. It appeared affirmatively, then, that the defendant had done "unnecessary damage" to the plaintiff: and we think it would have been proper so to instruct the jury. Therefore, in order that the inquiry may be submitted to them with proper explanations of the rights and duties of the parties, there must be a *venire de novo*.

Of course, it will be understood, that an action will not lie in such a case for noises that are barely audible, and only occasional; but only for such as really annoy the plaintiff's family and would annoy persons generally, who might dwell in the house so as to impair their rest and comfort materially.

Per Curiam. Judgment accordingly.

JAMES IREDELL TO THE USE OF JOHN M. FAUCETT vs. WILLIAM BARBEE.

A stranger may accept the delivery of a bond, and it is good, unless the obligee refuse to ratify the delivery, but in the absence of proof to the contrary such ratification is presumed.

In construing a deed all useless and unmeaning words are to be rejected, provided enough remains to make the deed sensible. Thus, where a bond, purporting to be a guardian bond, was made to "I, Governor, &c. Justices of the Court of Pleas and Quarter Sessions, &c. in the sum of &c. to be paid to the said Justices or the survivors of them," the words "Justices of the Court," &c. "to be paid to the said Justices," &c. are to be rejected as unmeaning and the bond is payable to I.

Where a Court has no power to appoint a guardian but does appoint him, and he gives bond with sureties and takes possession of the estate of the ward, it is not competent for any of the obligors in such bond to object to its validity on the ground of want of power in the Court to make the appointment.

The cases of *Fitz* v. *Green*, 3 Dev. 281, *Vanhook* v. *Barnet*, 4 Dev. 268, and *Richardson* v. *Wall*, 1 Ire. 227, cited and approved.

Appeal from the Superior Court of Law of Orange County, at the Fall Term, 1848, his Honor Judge CALDWELL presiding.

This was an action of debt upon the following bond:

STATE OF NORTH CAROLINA, }
Orange County. }

KNOW ALL MEN BY THESE PRESENTS, That we, Nathaniel King, William Barbee and David B. Alsobrook, all of Orange County, in the State aforesaid, are held and firmly bound unto James Iredell, Esq., Governor, &c., Justices of the Court of Pleas and Quarter Sessions for the County of Orange, in the sum of ten thousand dollars to be paid to the said Justices or the survivors of them, their execu-

tors or administrators, in trust for the benefit of the child hereafter named, committed to the tuition of the said Nathaniel King; to which payment well and truly to be made, we bind ourselves, and each of us, each and every one of our heirs, executors or administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 30th day of May, in the year of our Lord, 1828.

THE CONDITION of the above obligation is such, that whereas the above bounden Nathaniel King is constituted and appointed guardian to Elizabeth Fann; now if the said Nathaniel King shall faithfully execute his said guardianship, and particularly shall well and truly secure and improve all the estate of the said Elizabeth Fann that shall come into his possession for the benefit of the said Elizabeth Fann, and shall render a plain and true account of his said guardianship, on oath, before the Justices of our said Court, in all cases as required by Act of Assembly, and deliver up, pay to or possess the said Elizabeth Fann of all such estate or estates, as she ought to be possessed of, when lawfully required by said Elizabeth Fann, or to such other persons as shall be lawfully empowered or authorized to receive the same, and the profits arising therefrom, then this obligation to be void; otherwise to remain in full force and virtue.

(Signed and sealed by)

N. J. KING,
W. BARBEE,
D. B. ALSOBROOK.

The breach assigned in the declaration was that the said N. King had failed to deliver and pay over to the said E. Fann a large amount of property which he had received as her property. Pleas, general issue, conditions performed and not broken.

In support of the action it was proved, that the defendant had signed and sealed the bond in suit, and had

handed it to the Clerk of Orange County Court as his bond, and that it had remained among the records of that office until this suit was brought. It was further shewn, by a copy of the record from Orange County Court, that at May term of that Court 1824, a jury purporting to act upon a writ of lunacy, found Elizabeth Fann to be in a weak and debilitated state of mind, and that it was unsafe and injurious to those interested in the property, subject to her control, that it should remain longer in her possession: that upon that finding one John Wilson was appointed her guardian, and upon his death Nathaniel J. King was appointed her guardian at May term 1828, and entered into the bond now sued upon. It was further shewn that Elizabeth Fann was dead and that the relator was her administrator. And the report and account of the commissioner to whom the matter had been referred was offered in evidence to shew the amount of the plaintiff's damages.

On the part of the defendant, it was shewn that no petition or writ of lunacy could be found among the records of the County Court in the matter of Elizabeth Fann.

And it was contended by the defendant that this action could not be sustained: *First*, because there was no delivery of the bond: *Secondly*, because the bond was void for uncertainty and repugnance: and *thirdly*, because the verdict of the jury did not find Elizabeth Fann to be either an idiot or a lunatic, and therefore that the appointment of the guardian by the Court was a nullity and this bond given by the defendant was void. And his Honor was requested so to charge the jury.

But it was agreed by the counsel of the parties, that his Honor should reserve the questions of law and that the case should be submitted to the jury, and if they should find for the plaintiff, and his Honor, upon consideration should be for the defendant upon the questions re-

served, then the verdict should be set aside and a non suit entered.

The jury found for the plaintiff; and on another day of the term his Honor delivered his opinion adverse to the plaintiff's right of recovery. Whereupon the verdict was set aside and judgment of non-suit entered, from which the plaintiff appealed to the Supreme Court.

Norwood, for the plaintiff.

Waddell and *J. H. Bryan*, for the defendant.

Pearson, J. Such a construction should be given to every deed, as to give it effect, and carry out the intention of the parties. "*Ut res magis valeat quam percat*," is a well ruled maxim of law, formed upon good sense and calculated to promote the ends of justice.

It is clear that King was called to take possession of a large estate belonging to Mrs. Fann, in consequence of his entering into the bond now sued on, and that the defendant as one of his sureties, undertook, that he would pay over the estate to such persons as might be lawfully authorised to receive it. King did accordingly take possession of the estate, and has failed to account for it to the representative of Mrs. Fann. It would be a matter of regret, if, from any defect in the bond or any legal objection, the defendant could evade the performance of an undertaking, deliberately entered into by him, and throw the loss upon Mrs. Fann's estate.

The defendant has put himself upon his legal rights, as he was at liberty to do, and the question is, whether he is in law bound to make good the loss.

The counsel for the plaintiff properly admitted, that the paper could not be sustained as an official bond, and declared upon it as a common law bond.

It was proved, that the bond was signed and sealed and delivered to the clerk of Orange County Court by the

defendant. We think this was a sufficient delivery. A stranger may accept the delivery of the bond and it is good, unless the obligee refuses to ratify the delivery. but in the absence of proof to the contrary such ratification is presumed.

The second objection is, that the bond is void for uncertainty and repugnance. *Utile per inutile non vitiatur*, is a maxim of law, by which all useless and unmeaning words are to be rejected, provided enough remain to make the deed sensible. The words, "justices of the Court" &c, "to be paid to the said justices or the survivors of them" &c. are useless and unmeaning, and convey no definite idea, and are, therefore, to be rejected, leaving an obligation to pay James Iredell the sum of ten thousand dollars. *Fitz* v. *Green*, 3 Dev. 291, *Vanhook* v. *Barnett*, 4 Dev. 263, *Richardson* v. *Wall*, 1 Ired. 297, are cases in point and fully sustain this position.

The third objection is, that, as the verdict of the jury did not find Elizabeth Fann either a "lunatic" or an "idiot," the appointment of a guardian by the Court was a nullity, and this bond given by the defendant, was void.

It is true, the Court had not power to appoint King the guardian of Mrs. Fann and authorise him to take her estate into his possession, but the defendant will not be heard to make this objection; he concurred in the act; his bond solemnly asserts that. King was appointed guardian and had power to take the estate into possession, and after King has taken the estate into possession and wasted it, it is not for him to say, that it was unlawful, and, therefore, that he is not bound by his undertaking deliberately entered into. Upon that agreed state of facts, "his mouth is shut" and he shall not be allowed to take advantage of his own wrong.

The *technical* rules of the doctrine of estoppels are said to be odious, but there is no rule better calculated to do justice, and exclude dishonesty, than that by which, when

one solemnly admits a fact either by his own words or acts, and it is acted upon, he shall not escape from liability, by being heard to gain say it. It violates all idea of justice for the defendant to say, that it was against the policy of the law for him to give the bond, and thereby enable King to invade the rights of Mrs. Fann, and therefore, that he should not be bound to answer for the acts of King as he had undertaken to do. Mrs. Fann might have complained, but he has no right to do so. The illegal appointment was not the consideration, nor was the bond the inducement for making the appointment: it was a collateral security taken to insure a faithful discharge of *duties incident* to the appointment. The case of the *United States* v. *Manin & others*, 2 Brockinbrough 115, is directly in point. In that case, Manin had been appointed to an office by the *Secretary of War*, and had given bond, with the other defendants as sureties; it was admitted, that the appointment was void, and was against the law and its policy, as the appointment ought to have been made by the President, by and with the advice and consent of the Senate; but it was held that the defendants could not avail themselves of the illegality of the appointment, and were liable for all moneys received and not accounted for. In delivering the opinion, Chief Justice MARSHALL uses this language, "the appointment is illegal, but does that render the bond void? "It was given in the confidence that James Manin was legally appointed to office. Does the illegality of the appointment absolve the person appointed from the legal and moral obligation of accounting for public money, which has been placed in his hands in consequence of such appointment? If the policy of the law condemns such appointments, does it also condemn the payment of moneys received under them?"

The judgment below must be reversed, and a judg-

ment entered for the plaintiff upon the verdict, according to the agreement of the parties.

PER CURIAM. Judgment reversed and Judgment for the plaintiff.

JOHN McNORTON & AL. JOHN A. ROBESON.

A petition to set aside the probate of a will, on the ground of the want of citation of the next of kin, will not be granted for that cause alone, but merits must be shewn, and it must appear that the former proceedings resulted wrongfully, and that the interests of the petitioners, if under disability themselves, were not duly defended by those who undertook to defend them.

A petition to set aside the probate of a will, on the ground of newly discovered testimony, on points to which evidence was given at the probate of the will, will not be granted, unless such testimony not only repels the adversary's charge, but also destroys his proofs, by shewing that the former verdict was obtained by surprize and perjury.

The case of *Peagram* v. *King*, 2 Hawks. 295, cited and approved.

Appeal from the Superior Court of Law of Bladen County, at the Fall Term, 1845, his Honor Judge CALDWELL presiding.

This is an application to set aside the probate of an unattested script, as a will of John Kea deceased, disposing of his personal estate. It is made by three of his neices, who are the children of a sister of the party deceased, who died before him. Their names, were Lydia, Elizabeth, and Sarah King. and they and their husbands bring this suit. The allegation states, that the paper was propounded in 1833, and that it was contested by

some of the rest of kin of the deceased and an issue was made up of *devisavit vel non*, which was tried in the County Court, and an appeal in the Superior Court, and that thereon sentence was pronounced for the paper in 1833, and the executors named in it obtained letters testamentary thereon. The allegation farther states, that at that time, the parties, Lydia, Elizabeth and Sarah were respectively under the age of 21, and "were never legally cited to witness the probate of the said paper writing, nor were they in any proper manner made parties to the said contest, and that since the said paper was established they have intermarried with the other petitioners, the said Sarah being, at the time of her marriage, under the age of 21; and they submit, therefore, that they are in no way bound by the said proceedings." The allegation further states: that these parties have been informed and believe, that the script was neither in law nor in fact the will of the deceased, but was a forgery: that within six months before instituting this suit they had learned, and believe they would be able to prove, that shortly after the death of John Kea, John A. Robeson, (in whose hand writing the will is, and who is one of the executors and the father of a lad to whom one half of the estate is given by the paper) and William Jones (who is the father of another lad, to whom the other half of the estate is given) held a secret meeting in a room of the said Jones, in which one Hamilton Davis and one Benjamin Davis were accustomed to sleep, and that they were ordered by Robeson and Jones to leave the room, which they accordingly did, but not until they were enabled to discover, that the said Robeson was engaged in framing some instrument of writing, though they could not tell what, but discovered that the said parties, Robeson and Jones, were anxious to conceal it: that these parties expect to prove by a number of witnesses, whose knowledge of the matter has recently come to their ears, that the signature to the paper

is not in the hand writing of John Kea. The allegation also states other matters which the parties say they were at the bringing of this suit able to prove, which it is not material to mention, as no evidence is given respecting them. There is no affidavit in support of the allegation, except that of McNorton, the husband of the party Lydia, who swears that he believes the several matters set forth in the allegation to be true.

John A. Robeson, the surviving executor, put in a counter allegation, in which he states, that the will was executed by John Kea, and that upon the trial of the issue, the fact was fully proved by himself and others, and that many witnesses were examined to the hand writing of the said Kea; and that all the next of kin of John Kea were parties to the issue, including the three neices, Lydia, Elizabeth, and Sarah King, who appeared and were made parties in the County Court by their father and guardian, Solomon King; and that the cause was prosecuted both in the County and Superior Courts, with earnestness and vigor on both sides, and without collusion in any respect between the parties or either of them on the opposite sides. In support of the allegation on that point, Robeson exhibits a transcript of the appointment of Solomon King to be the regular guardian of his two younger daughters, Elizabeth and Sarah, by the County Court in February 1832; and also the transcript of the record of the Court, in which it appears, that the will was propounded by the legatees named in it and was "contested by Lydia King, Elizabeth King, and Sarah King, by their guardian Solomon King, and by Kinchen Kea," and by others; and that Solomon King prayed the appeal and entered into the bond for its prosecution.

Upon the hearing in the Superior Court, the Court refused to call in the probate and dismissed the allegation, and the cause was brought here by appeal.

Strange, for the plaintiff.
W. H. Haywood, for the defendant.

RUFFIN, C. J. The cause wholly fails, so far as it is sought to have a retrial of the issue on newly discovered evidence. The testimony of the Messrs. Davis is entirely inconclusive; and, besides, it is fully explained and repelled by other persons, who were in the room with Robeson and Jones at the time to which they refer. Some witnesses have been examined as to the handwriting of the signature to the will, who give the opinion, that it was not that of Kea, the party deceased, and some express doubts of it. But evidence of that kind will not suffice; for, it is only further evidence to the same point, which was in contest on the trial, and of the same character with that then given. The rule is correctly and forcibly laid down for such cases in *Peagram* v. *King*, 2 Hawks. 295, that it is not sufficient, that the newly discovered evidence goes to repel the adversary's charge, but it must destroy his proofs; and that is explained in the same case when it subsequently came up, 2 *Hawks.* 605, to mean, that it must show the former verdict was obtained by surprize and perjury. Indeed, the argument here put the appellant's case entirely upon the ground, that these persons were infants at the trial and were not parties to that proceeding. But it is a mistake to say, they were not parties. The record shows they were; and they appeared by their father; and it is certain that he prosecuted the case on their behalf *bona fide*, and the present allegation contains no suggestion to the contrary. The argument proceeds on the technical ground, that there is no citation on file for them, nor order of record appointing a guardian *ad litem*, and therefore that they were not "in any proper manner" made parties. However that might be a ground for a writ of error in a proceeding according to the course of the common law, it

cannot be listened to as the foundation of an application of the kind now before us. That must rest upon merits; and it cannot be granted, unless it be shown, that the former proceeding resulted wrong and that the interest of these persons was not duly defended by those who undertook it. If this were the sole ground for impeaching the former trial, to which these persons were, at all events, nominal parties, and of which they do not pretend they had not personal knowledge at the time, it may be well asked, why they delayed this application for more than seven years—for a longer period, it is to be observed, than would bar a writ of error. But, in truth, if this were a writ of error, this would not be a reason for reversing a judgment. In probate causes there is, properly, no plaintiff nor defendant, but all persons are actors: and it has never been the course in this State to have a previous order appointing a *prochein ami* to prosecute a suit of any kind for an infant. The Court has a control over persons, who undertake to sue for an infant; and if he be an improper person, or brings an improper suit, the Court will remove him and appoint another to carry on the suit, and make the first pay the costs improperly incurred. But it is not error, even if the appearance of an infant defendant be entered by guardian, before obtaining a rule of the Court for it, but only a misdemeanor in the attorney. 1 Cromp. 158, 2 Sellons Pr. 135, 141. The appearance must, indeed, be entered, as being by guardian, or *prochein ami*, and not by attorney; but, though it be regular to have a rule for the purpose, the rule does not form a part of the record, technically speaking, as it is ultimately enrolled. When the infant appears to act in the cause by *prochein ami* or guardian, it is sufficient; for it must be supposed that he was duly appointed and approved by the Court, or he would have been, otherwise, removed.

Viewing the case in any light, therefore, we can see no reason to disturb the probate, and the sentence of the Superior Court must be affirmed.

PER CURIAM. Judgment affirmed.

THE STATE TO THE USE OF ALFRED M. TREDWELL *vs.* HENRY A. ELLISON & AL.

Where a defendant has been arrested upon *mesne* process and gives bail, and, after judgment, the bail surrenders him to the sheriff, out of term time, no execution having been issued on the judgment nor any *committur* prayed by the plaintiff, if the sheriff releases him upon a bond to appear at Court and take the benefit of the insolvent law, the sheriff is liable for an *escape*.

The Act, Rev. Stat. Ch. 58, in this respect, only applies to cases where the debtor, upon surrender of his bail, is ordered into custody by the Court.

After such surrender, if the creditor, upon reasonable notice, will not charge the party in execution, either a *habeas corpus* or a *supersedeas* would be issued by the Court

The case of *Smallwood* v. *Wood*, 2 Dev. & Bat. 356, cited and approved.

Appeal from the Superior Court of Law of Beaufort County, at the Fall Term, 1848, his Honor Judge SETTLE presiding.

This is an action of debt on the bond of the defendant as sheriff of Beaufort, and the breach assigned is the voluntary escape of one Davis, a debtor to the relator. The case is this. After judgment in an action by the relator against Davis, his bail surrendered him to the defendant in vacation; and he took from Davis a bond in the penalty of $420 53 payable to the relator, reciting that the

relator had recovered judgment against Davis in the County Court for $281 70, and the latter had been surrendered by the bail, and with the usual condition for the appearance of the debtor at the next County Court to take the oath of insolvency; and the sheriff then set Davis at liberty. At the next Court, Davis appeared and was admitted by the Court to take the oath, though it was opposed by the relator. Evidence was given that when Davis was surrendered, he had property to the value of $30. The relator moved the Court to instruct the jury that he was entitled to recover such damages, as, in the opinion of the jury, he had sustained from Davis being let at large. But the Court directed the jury to find for the defendant, and they did so; and the relator appealed from the judgment.

Shaw, with whom was *J. H. Bryan*, for the plaintiff, submitted the following argument:

The right of the debtor in this case to tender to the defendant his bond with sureties, and of the defendant to take it and set him at liberty without putting him in prison, is claimed by reason of the words, "or be in custody by surrender of bail after judgment," which words are found, for the first time, in the 7th Sec. of the Rev. St. Ch. 58, and were not in the Act of 1822; and the defendant's right to do so is denied by the plaintiff; because, although these words are in the Rev. Stat., there are other words also therein set or placed both before and after them, and placed not merely in accidental juxta-position; so that these words are not to be read by themselves, as if they stood alone, but with these others that stand in connexion with them, and thus it will appear what is that state or condition of the debtor meant by the Legislature—or what is the *kind of custody* in which he must be, and from which by their provisions he is to be not only liberated, but so discharged therefrom that he cannot thereafter be arrested

or imprisoned for that or any other debt existing at the time of his discharge.

The defendant contends, that that custody simply which ensues upon the bail's surrender, if it be after judgment, entitles the defendant, the debtor, to give the bond; and the plaintiff says that the custody must be, one in execution of the creditor's judgment. By the 39th Section of the State Constitution, it is provided, "that the person of a debtor, where there is not a strong presumption of fraud, shall not be *continued in prison*, after delivering up, *bona fide*, all his estate, real and personal, for the use of his creditors, in such *manner* as shall be thereafter *regulated* by law."

The words used by the Legislature in making provision for the discharge of insolvent debtors from prison or custody, that have the most general and extensive sense, are those contained in the 1st and 4th Sections of the Rev. Stat. Ch. 58: they are "any person or persons taken or charged on *mesne* process or execution for any debt," &c. The next provision is in the 7th Sec. of the same Statute, which contains the words, "when any debtor shall be taken upon any *capias ad satisfaciendum*, or, be in custody by surrender of bail after judgment, for any debt," and these words "or be in custody by *surrender of bail after judgment*," have been added since the passage of the Act of 1822; but, except by the addition of them, there is no further or other change made in the words used in that act; none that signify or denote the wish or intention of the Legislature to provide for a new case, viz., a case where a debtor was not committed in execution at the suit of a creditor, but exactly the contrary to that does appear, and that they provide for an execution, custody, and not for one under *mesne* process. This Court has put a construction upon the words in the Act of 1822, in the case of *Smallwood* v. *Wood* 2 Dev. & Bat. R. 356, decided at June Term 1837, which is claimed to

be favorable to the right of the defendant to take this bond; because, it is said by him, that that case is evidence of what the defendant might have done under it; and now, after the addition of these words, he can do more than he could then have done; that, if he cannot, then added words are *made* to signify nothing. But the plaintiff says that the true interpretation of these words in the Rev. Stat. is found in that case, although it confirms a declaration of the *state of the law* when that case was decided, and when these or similar words were not in the Act of 1822; because, this Court in that case, expressly says, that upon the mere words then contained in that Act, the debtor was not entitled to give such a bond and be discharged out of custody; but that there was the same reason for the discharge of a debtor who had been committed at the suit of a creditor by order of Court in execution, after he had been surrendered by bail, as there is, where he had been *taken* upon a *capias ad satisfaciendum* at the creditor's suit. The Court held the law to be the same, by implying these or similar words, as if they had been expressed in the Act of 1822, and now, when they are expressed, is not this decisive evidence of what the law is, under this Revised Statute?— Does it afford evidence, when the required words are added, that thereby the sense is changed? Does it, as the defendant must contend, add one to it, so as to make a class of cases, three in number? viz: one case in express terms, when the debtor is taken by a *ca. sa.* another by implication or constructively, when he is committed in execution, and yet another, where the debtor, then in custody, was never so, by *ca. sa.* nor by a committitur. The defendant says that the very words added do, of themselves, shew an intention on the part of the Legislature to provide for a new case; or else, why were they added? The plaintiff answers, that they were added to provide in express words for the case of

a debtor, for whom before those was no express provision —*i. e.* for one in custody committed by order of Court, on prayer of the plaintiff, and in, under his execution. They certainly were not added to give this remedy of discharge as an insolvent to a debtor who voluntarily surrendered himself in discharge of his bail, or who on being arrested by the original or *mesne* process, for want of bail, was taken and remained in custody until after judgment. These words, *by themselves*, do not describe these cases or situations of the debtor, but they exclude them from this provision (upon the maxim "*Expressis unius, est exclusio alterius,*") if it did embrace the present case, which it does not.

Moreover, the restrictive provisions contained in the Act of 1822 are in this Rev. Stat. still retained, unchanged and without any modification, but, upon the defendants supposition, that the Legislature in 1836, intended to provide for a new and different case, why are not alterations made in the Rev. Stat., so as to adapt them to and to include it? Did they omit to do so, through inadvertency?

The instances of restriction are as follows viz: in this same 7th section, the debtor is to give a bond, payable "to the party at whose instance the arrest was made,' he is by sec. 13th, to give a notice, and it is to be "to the creditor at whose suit he may have been arrested," he is to have it served upon a prescribed individual—sec. 13—namely, "upon the party at whose instance any debtor may be arrested, or be in prison." The mode of service too is directed by the same section, "upon such creditor as has arrested him." In the 6th section, the language is, that neither arrest nor imprisonment shall be, of any person for any debt existing at the time of his discharge from prison, "where due notice has been given to the creditor at whose instance he was imprisoned." In the same section, provision is made for the adjustment of creditors'

claims, and the words are"—the claims of all creditors "as well those at whose suit he was committed," as of all others.

Do not these provisions *show* that the custody by them provided for, is one, caused or occasioned by and at the instance of an arresting or *imprisoning* creditor. There seems to be no ground from which to infer either inadvertency, oversight or inattention; the instances here stated are too numerous to have been overlooked. But this is not all; when, in this same Rev. Stat., provision is made for the case of a debtor in custody, by giving him the benefit of the prison rules, which is done in sec. 19th—the words used are "Any debtor, who may be in prison, on account of debt, whether under *mesne* process, or otherwise."

So also in the 6th section, when necessary food is provided for the debtor in custody, they say that "whenever any debtor shall be actually confined by reason of *mesne process* for debt, *capias ad satisfaciendum* or surrender by bail after judgment." But when in sec. 7th they provide for his discharge on account of insolvency, they say "when any debt or shall be taken upon any *capias ad satisfaciendum*, or be in custody by surrender of bail after judgment for any debt." If the question, whether so general and extensive a provision be made in the last section as in the two sections above mentioned for a confined debtor, were to be determined simply by the words in them, without taking into view other important considerations and reasons of weight and influence, some of which will be presented, could it be maintained that the remedy embraces every case of custody in the 7th that is described in the 19th and 6th sections? Is not a debtor arrested and confined under *mesne process* out of the words of description used in the 7th section, but expressly within those used in the 19th and 6th sections: but if they intended to include the case of a debtor arrested by

mesne process for debt, why were those words of description, used in the other sections, omitted in the 7th Section.

But if all this were considered to be but a kind of negative evidence, against the Legislature's intention to provide *this* remedy for one simply "in custody by surrender of bail after judgment for debt," there is still in this 7th Section what becomes full proof, that the custody, for which this discharge is given by them, must be one occasioned by a creditor's *execution* or what is *equivalent* thereto; because, this 7th Section, just as the Act of 1822 did, requires the bond to be given shall be conditioned for the debtor's appearance to answer, &c. at the next Court, "to which *the execution* shall be returnable." So also the 9th Section requires that the surrender is to be to the Court "to which the *ca. sa.* is returnable."

It is, therefore, quite apparent from the language of the Rev. Stat. taken together, that the debtor must be taken upon a *capias ad satisfaciendum* or be in custody by surrender of bail after judgment, at the instance of some creditor who ARRESTED him, by an *execution* or a *capias ad satisfaciendum.*

No matter by what kind of process a debtor is in actual custody, he does, in fact, in all cases, stand in need of a provision for his health, and necessary food—and this law does by the suitable comprehensive terms in it provide for him: but when a provision is to be made whereby one of the remedies theretofore by the law given and yet in use, for the collection of a creditor's debt, is to be taken away from him; and when previously made and existing rules of proceeding, applicable both to the rights of creditors and the duties and obligations of the officers of the law, are to be altered: more than three or four words by *themselves*, standing in the midst of others of a known and qualifying signification, are required to make change and give a new remedy to an arrested or confined debtor, without doing an injury to others having equal merits:

and to say that the Legislature have made such a change by such words, especially when there are others both before and after them which clearly shew that the custody to which they allude is an execution custody, and not a custody under the *mesne process*, is not treating them with due respect. It is a great mistake to suppose that the kind of custody of a debtor which ensues upon a surrender by his bail, either before or after judgment, whether interlocutory or final, has escaped the attention of the law or our Legislature, any more than has that custody which is the result of the creditor's execution. The common law or the practice of our Courts under it, and also the Legislature, have both made such provisions for these respective cases as were deemed to be fit and proper. Relief for a debtor surrendered by his bail, at any time before final judgment, is by the Rev. Stat. Ch. 10, Sec. 5, given, by allowing such debtor to give other bail; and if he be surrendered by his bail after final judgment, he cannot prevent his being taken and kept in this custody—he is not in such case allowed to give other bail, and thereby be liberated from prison: but as the right of his creditor is concerned, who has lost, by the bail's surrender, the security of the bail, and as the creditor has a judgment upon which he may, at his pleasure, have an order to subject the body of the debtor for its satisfaction, the debtor, so in custody, can, by a notice and rule served upon the plaintiff in the judgment, compel them either to charge him in execution, or procure himself to be by order of Court set at liberty. If the creditor do not, as he may, charge him in execution in a reasonable time after notice and rule served, then the debtor is ordered to be liberated therefrom: and this custody, one which can only be temporary, when it ceases, can never thereafter occur again. The bail, by the surrender is discharged, and he can never thereafter be, by the bail's surrender and the law, put into this kind of custody. The same remedy applies for

a debtor, never surrendered, but who is in this kind of custody; and such was the proper remedy for the debtor surrendered in this case.

Moreover, such debtor, so surrendered by his bail, or one, that was never so surrendered, but was in custody from the arrest upon the original process up to the final judgment against him, need not suffer imprisonment, but both are entitled to the benefit of the prison rules, by the 19th Sec. of this Rev. Stat. and by Ch. 90, Secs. 11 and 12, of the Rev. Stat.

To discharge or liberate a debtor out of custody before or after judgment, certain rules must be observed: he must put in bail, or obtain a rule of Court for that purpose. *Rev. St. Ch.* 31, *Sec.* 54. To discharge a debtor out of custody, and to discharge him therefrom as an insolvent, are subjects in their own nature distinct, and they have higherto been kept distinct by our Legislative enactments respecting them; but, if the claim of the defendant, in this case, shall succeed, then the lines of distinction have not merely approached near to, but have run into, each other. The Act of 1822 and this Revised Statute were passed not to liberate an arrested debtor from arrest, nor a confined one merely from custody; it is far more potent and energetic than that in its effects. It is to be remembered that before that Act and this Revised Statute were passed, it pleased the Legislature to require that every debtor when taken or charged upon *mesne* process or execution for debt, who proposed to obtain his discharge as an insolvent, or to deliver up his estate for the benefit of his then creditors, should be placed in prison and be and remain there or within the rules thereof, for twenty days. But, since these enactments, no actual imprisonment either in prison or within the rules thereof, is required to enable the debtor, if taken or charged in execution, to be discharged as an insolvent or by reason of such surrender of his property. If taken or arrested by

a *ca. sa.*, he is entitled, upon giving the prescribed bond, to be released from custody, a custody different from that under *mesne* process, an execution or final process custody; so, if committed in execution, by giving such bond, he is to be released from confinement, in each case, until certain ulterior proceedings be had, but not from execution. But he is not yet discharged as an insolvent debtor, being yet in execution; though out of prison, he is yet in danger of it, and if surrendered by the securities to the bond, he must be imprisoned, just as he would have been, had he, upon the arrest or the previous confinement under execution, been unable or failed to give such bond; but if not so surrendered, or whether he be or not, he has still to make and prove one of two allegations, viz: either that he is *then* insolvent, or that all the estate which he *then* has, is combined in a schedule by him filed and offered to his creditors; upon which allegations being made, his arresting creditor and any other of his creditors to whom he has given notice, may take issue, and it is only after proof by him made, or no proof to the contrary, that his allegations are true, that he is entitled to have the entry made, which, when made, operates to discharge him out of execution and gives him the privilege of an insolvent. Before these enactments he had to make the same *allegations* and prove their truth, in case they were controverted, just as since he has still to do; but since he is, when arrested and in execution, kept out of prison or liberated therefrom for a time, so that he may be in a condition of perfect equality with his creditors and be able to make all necessary preparation before and at the trial, in case his allegations, that entitle him, if true, to his discharge from execution, be controverted. The arresting or imprisoning creditor has given to him, by these enactments, in the mean time, the bond and security by them prescribed, to compel the debtor, in execution at his suit, to appear and make and

prove his allegations: but only in case the debtor do fail to *appear*, at the time and place, when and where he must make and prove such allegations, do the Statutes enable that creditor and him only, to proceed to take a judgment upon the bond and subject the debtor and his sureties to *his debt and costs*. But, in case he do appear, and it be shewn that he is not then insolvent, but is able to pay, or, that the schedule is untrue, then, he is subjected to imprisonment until, &c. and *this imprisonment is in execution*, at the suit of the arresting creditor. *5 Ired. R.* 657. *Williams* v. *Floyd*, 6 Ired. Rep. 119. *Wright* v. *Roberts*.

This scheme or plan devised by the wisdom of our Legislature says to the creditor, you have a recovery against your debtor and have taken or charged him in execution, in order to obtain satisfaction of it, he is in prison, or in execution, and so liable to be imprisoned to that very end; you allege he has property to pay it, and he says to the contrary, or, he offers to surrender all that he has as he says, and you deny this to be true; you may have an issue to try it; to enable him to do so, he shall be set at liberty until, &c. and if it appears that he is now unable to pay, or that he has now surrendered all the estate that he now has, he ought not to be and shall no longer be continued in prison, or in such custody under your execution as renders him liable to confinement, but if the contrary appear, then he shall go into prison and shall there continue until, &c. But it does not say to the debtor, you have been condemned in debt and damages, but have never been arrested by execution or committed to prison for the same, by any of your creditors; yet, you have been, by your bails surrendering you after judgment put in custody, and you may give a bond to the plaintiff in the suit, just as if he had arrested you or caused you to be committed in execution, the bond to be in twice the amount of the debt, that would be contained in the execu-

tion, if one had issued to the sheriff; conditioned for your appearance at the Court to which an *execution on the judgment*, had it issued, *would have been returnable*; you may also give notice to your creditor or your creditors at *whose instance* you *might have been arrested*, but as you have not been by such arrested, you may give notice to the *plaintiff* in the *judgment*. If you had *never given bail* after judgment, even though you had been in this custody after judgment, (because, it applies, in general, only to discharge a debtor against the effect of his creditor's execution) you would, in such cases, have had to procure your liberation from custody, just as they have to do: but as by the act of 1822 and this Rev. Stat., in the case of a debtor that has been by his creditor put in execution, it is so provided, that if *he* will give a bond, in the form prescribed, the 20 days imprisonment theretofore required is now done away, and *he* is not merely placed in a situation to prepare for the trial of his allegations, and *he* can thus procure his discharge from the execution; so may you do likewise, because the law or its policy has now taken away all *imprisonment* for debt, in cases of execution sued against a debtor, and yet you are in prison, or its rules, and as you cannot get out, situated as you are, by giving other bail, and without a rule of Court, so, whenever, after judgment, you or your bail choose to surrender, and y ou wish it, your case shall be treated, as if you had been put in execution, by some creditor of yours, and that too, whether any of your creditors *now* wish to do so or not.

It is not denied that the Legislature may, if they think fit, make a provision for liberation of one in this kind of custody, that they may direct that one surrendered by bail even after judgment, may be re-admitted to bail, or that after judgment, they may direct that upon notice by the bail to the Plaintiff of his *intention* to surrender, the bail shall be thereby discharged, or that when so surren-

dered upon his giving bail to appear, so that the creditor may, after notice, charge or forbear to charge him in custody for his *debt*, and, if he forbear, that the debtor be liberated from the *mesne* process custody, but it is respectfully denied that the Legislature have, as yet, made any such provisions. Since this Rev. Stat. and by an Act recently passed 1844–'5, ch. 31, a creditor is not permitted to issue a *ca. sa.* upon his judgment, when he thinks fit; he must first make oath that he believe one of three things to be true: but it is respectfully contended that neither the debtor nor his bail, by a surrender of the debtor, after judgment, can prevent the creditor from permitting his judgment to lie and be outstanding and unsatisfied, without any of the executions by the law provided for him, to enforce its payment, whenever he can and shall make the required affidavit, being taken away from him, until, he or some one creditor of his debtor, do first, by an execution put their common debtor in execution; that until this first step be taken by a creditor, the debtor cannot begin and move against his creditor for his discharge as an insolvent.

But, says the defendant, did not the plaintiff in this case, after a judgment against his debtor, Davis, issue and have executed upon the bail of Davis a writ of *scire facias* (Stat. ch. 31, of 1844–'5,) and did he not thereby not only manifest his intention to put his debtor in execution on his judgment, but was not Davis without prayer and order to that effect, put in execution of his judgment ment? To this the Plaintiff answers, that before this Act was passed, upon a *sci. fa.* against bail, until, after judgment had upon it, neither the defendant nor his bail could be taken in execution. Rev. Stat. ch. 10, s. 9.

And this act of 1844–'5, prevents the plaintiff from having the *ca. sa.* issued, except upon affidavit. Also before this Act, and of course since, the bail could not by himself place the debtor, his principal, in execution at the

instance of the plaintiff in the judgment: but could only surrender the principal in his own exoneration, to be committed, it is true, but only until it should be in the power of the plaintiff (after notice to him of the surrender) to pray and have an order for the debtor's imprisonment in execution: and without such order made, upon the prayer of the plaintiff the defendant could not be imprisoned at his suit. 1 *Bac. Abr.* 345. *Hob. Rep.* 367. 3 *Ired. Eq.* 285.

Rodman and *Stanly*, for the defendants.

RUFFIN, C. J. The Court is of opinion, that the instruction was erroneous. The Act of 1822, according to the letter, provided only for the discharge of debtors taken upon a *capias ad satisfaciendum*; and it was contended in *Smallwood* v. *Wood*, 2 Dev. & Bat. 356, that it was confined to that single case of an arrest upon a writ of execution. But the Court held, that its true interpretation extended it to that case: which was, that the debtor was surrendered in Court by his bail after judgment, and the creditor prayed him in custody as in execution. It was so held, because that was substantially a *ca. sa.*, requiring the sheriff to keep the debtor in close custody, and rendering him liable in debt for an escape. It happened, that while that case was *sub judice*, the Legislature was passing in 1836 on the Revised Statutes, and there were added, after "*capias ad satisfaciendum*" these other words, "or be in custody by surrender of bail after judgment." Upon those words, we presume, the sheriff acted, and his Honor founded his opinion, in this case. But we think, that is putting on them an erroneous construction. We have reason to know, that the amendment was made for the purpose of covering the point, which had then arisen in *Smallwood* v. *Wood*, and for that purpose merely. The object was to make the Act express to that point; which the Court, however, held, a few months afterwards,

to be within it, according to a sound construction, without those words. Although the words of the amendment are general, yet it is to be considered from the subject matter and context, what sort of custody and surrender by bail is meant in the Act. It seems to the Court clearly, that it is a custody at the instance of the creditor; which can only be when it is ordered by the Court upon his motion, as in execution. The provisions of the Act of 1822 in other respects remain unaltered, and they plainly point to such a custody as that mentioned. The bond is to be for the debtor's appearance at the Court, "to which the execution shall be returnable," and "in twice the amount of the debt." If the surrender be in Court and the debtor be committed in execution, the sheriff has the means of knowing his duty in those respects, just as if he had a writ of execution. But when the surrender is to the sheriff in vacation, how can he know at what Court the appearance is to be, or in what sum the bond is to be taken. He has nothing in his hands to inform him on those points; and it may be, that the Court, in which the judgment was rendered, is in a distant part of the State. That is a material consideration; for, if the sheriff can discharge the debtor out of custody in any particular case, he is bound to do it. We think it clear, that the law could not mean, that the sheriff should be obliged to let the debtor at large at his risk, without furnishing him in the event of such case with the certain means of knowing for what sum and with what provisions he must take the bond. But the Act provides for no such things in the case of a surrender out of Court. On the contrary, it constantly speaks of the debtor within its purview being one in custody "at the instance" of the creditor. That is so, when it directs to whom the bond shall be payable, and the notice given, and in other parts. Besides, there was no necessity for any further provision as to persons in custody for want of bail, than that in the Court law

of '77, which authorises their discharge "by rule of Court:' a provision made, no doubt, in reference to the practice in similar cases in England, where upon a rule a supersedeas is awarded for such a prisoner, if the creditor unreasonably delay to declare, or to proceed to trial, or to charge in execution after judgment. 1 *Tidd's Pr. Ch.* 15. Upon a surrender by the bail in term, the Court would discharge the debtor, if the creditor upon notice declined praying him in custody, as in execution. If the surrender be to the sheriff in vacation, the party would in like manner be discharged on *habeas corpus*, if upon reasonable notice the creditor would not deliver a *ca. sa.* or a *committur* under the 22nd section of the Act of 1777, Ch. 115; or, doubtless, the Courts may make rules for a supersedeas upon such a surrender to the sheriff, if the creditor, after reasonable notice, will not charge the debtor in execution. But to charge him in execution must be the act of the creditor. The debtor cannot place himself in execution, nor can his bail, so as to deprive the creditor of his execution against the property of the debtor, which the creditor might prefer, at least for the time. It cannot be supposed, that the law meant that the sheriff should, without any process to guide him, or any authoritative means of ascertaining the creditor's demand or wishes, be obliged, or be at liberty of his own head, to let the debtor at large. There is another very material consideration to be taken into account on this subject. After a discharge from custody under a rule of Court, the creditor is not concluded from proceeding against the body; but he may have any execution against the property or person, which he may deem at the time most likely to be effectual. But by this other mode it may be so contrived, that the debtor may presently and conclusively discharge himself, and that, in view of soon having the means, with which he might be compelled to pay the debt, if the creditor could by a *ca. sa.* get at him.

If the debtor be actually imprisoned for want of bail, even before judgment, he may take the oath of insolvency after twenty days, by the Act of 1773; and so he may, if he be thus imprisoned after judgment, whether for the want of bail originally or upon a surrender. Both of the cases stand precisely on the same footing. The Legislature never meant to compel a creditor to take the debtor in execution, and thereby cut himself off from other process, nor enable the debtor, without going to prison, by any concert with his bail or the sheriff, to conclude the creditor as if he had taken the other party in execution. What the law means, in the first place, is, that the creditor shall not keep his debtor in prison indefinitely without charging him in execution; and, in the next, that, when the debtor is charged in execution, he may keep out of prison by giving a bond with good sureties to pay the debt, or to give up all he has towards its satisfaction and to take an oath that he has nothing, or no more. For aught that we can see in this case, the debtor might have transferred to the relator the little property he had, if the sheriff had not discharged him.

PER CURIAM. Judgment reversed and *venire de novo*.

ANN HENRY & AL. *vs.* CHARLES HENRY & AL.

Per NASH and PEARSON, J. The word "distributees" may be properly used in a petition, calling an administrator to an account, to denote those, who are entitled to succeed to an intestate's estate, under our Statute of distributions.

Per RUFFIN, C. J. The word "distributees" is not to be found in any English Dictionary or in any law book and conveys no definite idea. It therefore cannot be intended by the Court to mean those, who are entitled to distribution of an intestate's estate.

Appeal from the Superior Court of Law of New-Hanover County, at the Fall Term 1848, his Honor Judge MANLY presiding.

The petitioners allege, that they are the "heirs at law" and "distributees" of Hezekiah Bonham, who died intestate; that the defendants are the administrators of the said Bonham, and, as such, took into their possession negroes, bonds, money, and other personal property to a large amount. The prayer is for an account and distribution.

The defendants admit, that they are the administrators *de bonis non* of Bonham, but they allege, that administration upon his estate had been before granted to one Neil Henry, who died intestate, and that one Nathan Bonham is the administrator of the said Neil Henry. They, therefore, insist, that they are liable to account with the said Nathan Bonham, and not with the petitioners, Ann Henry or her children. They further allege, that Neil Henry committed a *devastavit* to the amount of about $800, and they are the sureties on his administration bond; "they maintain, that the estate of the said Neil Henry is responsible for this deficiency, and the defendants having the

share of the estate of the said Hezekiah Bonham in their hands, to which the representatives are entitled, they have a right to retain the same, or so much thereof, as shall be sufficient to pay, satisfy, and discharge the said deficiency."

A reference was made to the clerk to take an account. The clerk made a report, to which the defendants filed an exception. The case came on to be heard upon the petition, answer, report, and exception. The exception was overruled, and the report was confirmed, and a decree for the petitioners, from which the defendants appealed.

Strange and *W. A. Wright*, for the plaintiffs.

No counsel for the defendants.

PEARSON, J. The petitioners claim the personal estate of the intestate, as his "heirs at law" and "distributees." The word "heirs" is used to denote the persons, who are entitled, by descent, to the real estate of a deceased ancestor. It is appropriated to that purpose, and when used in pleading, in reference to personal estate, it has no meaning, and must be rejected as surplusage.

The other word, "distributees," is new in pleading, but my brother NASH and myself deem it admissible to denote the persons, who are entitled, under the statute of distributions, to the personal estate of one, who is dead intestate.

No one word has heretofore been used for that purpose, and it has been necessary, in order to covey the idea, to make use of a paraphrase or set of words. "Widow" or "next of kin" are sometimes used in pleading, but these words are insufficient to convey the idea; for "next of kin" means nearest of kin, and does not include those, who are entitled by representation. The statute of distributions uses the words "next of kin of the intestate, who are in equal degree, and those who legally represent

them." To avoid the use of so many words, it is certainly desirable to have one word to convey the idea, in reference to personal estate; and as there is a necessity for *making a word*, we can see no objection to the word "distributees." It commends itself, because it is new, and has not been appropriated to any other use, and is as fit and seemly a word, as feoffee, mortgagee, bargainee, bailee, endorsee &c. We know the word "distributee" is now in common use among the legal profession, and the fact that it has been adopted by the profession and the legislature, notwithstanding the severe rebuke given to it by Chief Justice HENDERSON in *Croom* v. *Herring*, 4 Hawks. 393, is a convincing proof that the necessity for a new word really existed.

But yielding to the petitioners the benefit of this word, they have not entitled themselves to a decree, because there is no proof, that they are distributees. The answer does not admit it, and no depositions have been taken; and we should reverse the decree made below, and dismiss the bill, but for the fact, that the answer is equally defective, and we feel disposed to extend great indulgence to proceedings commenced in the County Court. The answer does not state the ground, upon which the defendants maintain their right to retain the share of the estate, to which the representatives of Neil Henry are entitled. Nor does it state upon what ground, Neil Henry became entitled to a share of the estate of Hezekiah Bonham. We conjecture from what is stated, for the first time, in the decree, that Niel Henry was the husband of Ann Henry, the petitioner, and that the defendants wish to raise the question, whether, as husband, he was not entitled to her distributive share, but there are no allegations to raise the question and no proofs whatever.

The decree made below must be reversed, with costs in this Court, and we will then direct the cause to be re-

manded upon the motion of the petitioners, so as to let in amendments and give an opportunity to make proofs of the allegations. If no such motion is made at this or the next term, the petition will be dismissed.

Ruffin, C. J. Having the misfortune to differ in opinion with my Brothers on one point in the case, I must take the liberty of stating my reason, and to make myself the more intelligible, I will state the case as it appears in the record. This is a petition for an account and distribution of the personal estate of an intestate, Hezekiah Bonham. It was filed in the County Court by Ann Henry, Nathaniel Bonham, and six other persons, in December 1842, and it states: "That Hezekiah Bonham died seme years since intestate and possessed of or entitled to many negroes and to money, notes, bonds, and other personal property: that your petitioners are the distributees and heirs at law of the said Hezekiah: that after his death, administration of his personal estate was granted to Neil Henry, and that he had it in possession a considerable time longer than in law he was entitled to keep it, and then died; and that the said administration was thereupon granted to Charles Henry and Archibald F. Murphy: that the said estate required very little delay in settling with the heirs, your petitioners; for your petitioners show, that there were no difficulties or very little to prevent the said administrators from paying and settling with the heirs aforesaid: that the said Henry Murphy continues to detain the said negroes and other property, although called on by your petitioners to settle with them as the distributees and heirs as aforesaid." The prayer is, that the administrators may be decreed to settle and pay over "to said heirs their portion, or to settle with the Court, so that your petitioners may receive their due proportions; and also that your worships will appoint three commissioners to divide the said negroes among the heirs as aforesaid," and for general relief.

The answer admits that Neil Henry administered on the estate of the intestate Hezekiah Bonham, and states, that the defendants were his sureties for the administration, and that the said Neil died intestate and Nathan Bonham is his administrator. It then insists, that the defendants "are bound to account to the administrator of Neil Henry, and not the present petitioner, Ann Henry or her children;" and it proceeds farther thus. "These defendants show, that Neil Henry committed waste in the management of the estate to the amount of about $800, and is responsible to the distributees of the said Hezekiah therefor; and they maintain, that the estate of the said Neil is responsible for this deficiency, and that these defendants, having the share of the estate of the said Hezekiah in their hands, to which the representatives are entitled, they have a right to retain the same or so much thereof as shall be sufficient to satisfy the said deficiency."

In June 1844, it was referred to the Clerk "to take an account;" and in September following he reported: first, an account between Neil Henry, the first administrator, and the estate, on which a balance of $1673 39 was found due to the estate on the 1st of January, 1841; and secondly, an account between the present defendants as administrators and the estate, on which a balance of $2179 78, was found due to the estate on the 13th of July, 1844, arising from the hire of negroes, sales of property, and money received on bonds to the intestate.

The defendants excepted to the report, because "they are not liable for the amount reported to be due from Neil Henry, but only responsible as administrators *de bonis non* for such sums as have been by them received."

From a decree in the County Court in favor of the plaintiffs, the defendants appealed; and in the Superior Court, the exception was overruled and the report confirmed, and a decree made; in which it was declared, "that the petitioners are entitled to distribution of the es-

tate of Hezekiah Bonham, deceased, and that Neil Henry administered on the said estate and gave for sureties to his administration bond the defendants, Charles Henry and Archibald F. Murphy: That the said Neil died intestate without having administered the said estate of the said Hezekiah and made distribution thereof among his next of kin: at the time of his death the said Neil had in his hands of the said estate the sum of $1673 39 unadministered, on which he was accountable for interest from the 1st day of January, 1841, making up to this sum of $709 51: that there is in the hands of the defendants, Henry and Murphy, as administrators *de bonis non* of the intestate Hezekiah, the sum of $2179 78, without taking into account the balance in the hands of Neil Henry at the time of his death, with the interest thereon; for which balance with interest as aforesaid the defendants are liable: and that the whole liability of the defendants to the plaintiffs is for the sum of $4562 68, with interest on $2179 78 from the 10th day of September, 1844, and on $1673 39 from this time until paid." There was a decree accordingly for payment to the plaintiffs and for costs in both Courts; and the defendants appealed.

It has been stated at the bar, that Ann Henry, one of the plaintiffs, is a daughter of the intestate Bonham, and the widow of Neil Henry, the first administrator of Bonham; and that the questions made at the hearing, and which the parties desired to present here, are, whether the distributive share of the wife vested in her husband or survived to her; and whether the defendants are chargeable in this suit for the *devastavit*, if any, of Neil Henry. But a prelimary difficulty exists as to the facts necessary to raise those questions. It is not stated in the pleadings, that Neil Henry was the husband of the petitioner Ann, or had any connection with the intestate's estate, except as administrator. There is a vague state-

ment in the answer, that the defendants are bound to account to the administrator of Neil Henry, and not to the petitioner, Ann, or her children. But why he should account to one in preference to the other, or, indeed, to either, is not suggested, and can be conjectured only from the information communicated by the bar. The Court cannot, then, determine the question as between the husband and wife, as the marriage is not alleged, and, consequently, could not be declared.

So in respect to the other question, the enquiry is necessarily presented in the first instance, whether the plaintiffs have a right to the estate, before it can be considered, whether the defendants are to be charged with this, or that demand. It is indispensable, that a plaintiff should in his pleading give himself a title to the thing he demands, for the Court cannot declare one, which is not set up. These plaintiffs say, they are the "heirs at law and distributees" of the intestate Bonham, and they pray, that the defendants may be decreed to pay to "the said heirs" their portions of the estate, and that the negroes may be divided "among the heirs as aforesaid." The plaintiffs, therefore, claim as "the heirs and distributees" of the intestate. The statute distributes the personal estate of an intestate among his "widow and children or next of kin in equal degree or their legal representatives," and not to the heirs. The term "heirs" has no proper signification in respect to the right of succeeding to personalty. It is often used in wills and in inaccurate conversation to signifiy, in an improper sense, children, sometimes, and at other times, descendants, or issue, or nearest of kin, or the persons entitled under the statute of distributions; and these different meanings are arrived at from the context. But it, surely, would not be tolerated in pleading as expressing either of those senses, or constituting a title under the statute to the personal estate of an intestate, after debts paid. Upon that point, however, my Brethren and I concur.

The other term, by which the plaintiffs describe themselves and make title, is yet more objectionable, as I conceive. "Heirs" is an English word and a term of the law, and is, therefore, understood, though improperly applied to this subject. But "distributees" is not a word at all known in the law or the language. Until my Brothers told me, that they understood what it meant, I must humbly beg pardon for saying, that I looked upon it as a newly invented barbarism, and without any settled sense. Indeed, I do not now understand from what source the meaning of the term is derived. I believe it is a phrase which is sometimes used in common parlance by persons, who are not of the profession and do not aim at accuracy in speaking on legal subjects. Some members of the bar may have, thence, fallen into the use of it sometimes in discussion, when precision of expression is of the less importance, as there is opportunity for explanation. But those, who indulge themselves in that mode of speech, are so sensible of its impropriety, that, as Judge Henderson remarked in *Croom* v. *Herring*, 4 Hawks. 393, they seldom use "distributee" without an apology; knowing that it is not to be found in any English dictionary, or English book—much less in a law book. I believe I may add, that up to this day, it has not obtained admission into any American dictionary, though at least one of them has been supposed to have taken in every word that could possibly be tolerated. But when used, it has not seemed to me, at least, to be in any definite sense. Like "heirs" in reference to personalty, it has appeared to be intended sometimes to designate children by it; at others, the widow and children, or all the kindred or a single one, that may be entitled to distributive shares or the whole property, by original right or by representation; or even a person entitled to a share by assignment. I know, I have heard a single child called "sole distributee;" and also that one, who had purchased a share, "had become a

distributee." So, I had really supposed, that there was no meaning attached to the word by itself, in the mind of any one, but that it varied in vulgar use with the context; and that, therefore, it was wholly inappropriate to describe a title to property in pleading and entries. In wills or contracts the Courts would be obliged to receive it in some sense, and would endeavor to discover that which would subserve the intention in the particular case. If, perchance, it were to find its way into a statute, the judicial duty would be the same. But that would not render it proper to transfer it into judicial proceedings. For legislators, like testators, take the right to puzzle Judges as much as they please and often do not trouble themselves much in the selection of terms. The same latitude, however, is not to be claimed by pleaders and clerks. Pleadings and the entries of judgments and decrees ought to be in the language of the law. For them there are *precedents*, settled long ago by the wise and the learned, and used from generation to generation by those, who were and are as discreet and well informed as any among us can claim to be. I think it, and always thought it right to observe them, myself, and would fain beg the respect of others for them: asking, why despite should be done to forms venerable for their antiquity, certain in their meaning, and, for those reasons, ensuring order and precision in the despatch of business and the sense of records. The lawyer, who scorns to follow forms, may depend upon it, that he will not long love the law itself, for in refusing to conform to the patterns set by the law, he does despite to its essential elements of precision and certainty, and to some extent brings into disrepute the science itself. Why should terms, in which pleadings and entries have been expressed time out of mind, be rejected, and in their room words made and adopted, which no two men here always use in the same sense, and which would be altogether unintelligible, for example, in West-

minister Hall, and, indeed, in all other countries where our law and language prevail? I own, I can see no reason for it; but, on the contrary, I am sure that it would greatly promote the ease of pleaders and Judges and the certainty of the law, to adhere to the precedents as examples of the forms of proceeding, as well as standards for settling the principles of the law itself. One departure from the rule invites another, and this proceeds until no rule is left. I think Judges, with whom is the charge of preserving the law in its integrity and administering it uniformly, ought to reverence its established forms and steadfastly insist on their due observance, as the best guards of the law itself. It is always safe, *stare super antiquas vias*. In this case, for instance, if an inquiry were directed to ascertain, who are entitled to the personal estate of the deceased, and in what proportions, it surely would not be ordered in the terms of the petition, that is, to enquire "who are the heirs and distributees of the intestate Bonham." If it would, I must say, it would be for the first time in this Court, since I have been a member of it. The word has now and then been in bills, but always with something else, which enabled the Court to reject it and then have enough to give the parties a title, as by saying, that the plaintiffs were the children of the intestate, or the like. But I am nearly confident, that no decree or order has passed under my notice with "distributees" in it, nor decree made upon a bill describing the title of the plaintiffs by it alone. I feel bound, therefore, to express the opinion, that the petition ought to be dismissed with costs. I should, perhaps, have no objection to remanding the case, if it had been asked, so as to let in amendments; as it is probable the plaintiffs may be the widow and children of Bonham. But in truth, the petition is so defective and all the proceedings in the cause so very loose and informal, that the needful amendments would amount to much the

same as a new petition. Besides, the questions between the parties can be better raised by a bill, making the administrator of Neil Henry a party, so as to make his estate, if any, directly liable for his *devastavit*. But as my Brothers think differently, the cause must, of course, be disposed of as they may order.

PER CURIAM. Petition to be dismissed, unless the plaintiffs apply at the next Term to hear the cause remanded.

DEN ON DEMISE OF JAMES L. BATTLE & AL. vs. JOHN F. SPEIGHT.

A. made his will in 1837, in his own hand-writing, but unattested, and it was placed among his valuable papers. Afterwards, in 1847, being about to leave this country, he deposited this will, together with other papers, with a friend for safe keeping. *Held*, that this did not of itself amount to a republication of the will, and that therefore land acquired after 1837, did not pass under it.

The Act of 1844, ch. 83, making devises to operate upon such real or personal estate as the testator may own at the time of his death, does not apply to wills executed before the passage of that Act.

Appeal from the Superior Court of Law of Edgecombe County, at the Spring Term, 1848, his Honor Judge CALDWELL presiding.

Louis D. Wilson made his will on the 26th of May 1833, and therein devised to Eliza Cotten two lots in the Town of Tarboro', which he then owned. He also devised to John F. Speight, the chairman of the County Court of Edgecomb and his successors in office, the residue of his estate, both real and personal, for the use and

benefit of the paupers of that County, to be appropriated and managed under the superintendence of the Justices of the peace of the County. The will was in the testator's own handwriting and signed by him, and at the time deposited by him among his valuable papers. In the year 1847, being about to leave the State, he deposited with a friend, for safe keeping during his absence, his valuable papers, including his will, and he died while absent. Eliza Cotten died before the year 1847, and, between the making of the will and the year 1847, the testator purchased a tract of land. The defendant claimed both the land thus purchased and the lots devised to Eliza Cotten, under the residuary clause in the will; and they are also claimed by the lessors of the plaintiff, who are the testator's heirs at law, and have brought this suit for them. On the trial, the Court held that the premises passed under the will to the defendant; and the plaintiff suffered a non-suit and appealed.

B. F. Moore, for the plaintiff.

Whitaker, for the defendants.

Ruffin, C. J. If the heirs at law be not entitled, it must be by force of a republication of the will, or the operation on it of the act of 1844, ch. 83. For, nothing was better settled under the former statute of wills, than that land purchased after the making of the will did not pass by it, however general the terms of the devise might be. The reason was, that a devise is a conveyance and therefore must operate on a specific subject. For the same reason, if a devise failed by the death of a devisee before the testator, the land did not fall into the residue but went to the heir at law. For, although land may pass under a residuary clause of a will, as well as personalty, yet there is this difference in the operation of that clause on realty and personality; that it takes in every thing

of the latter kind that is not well disposed of, whereas, in respect to the former, it takes in only what is not before given away in the will—for each gift of land, whether so in terms or not, is in law specific, and one cannot be enlarged by the failure of the other, unless there be a limitation over in the event that happened. *Morris* v. *Underdon*, Willes Rep. 293. *Howe* v. *Dartmouth*, 7 ves. 137. It was one purpose of the act of 1844 to alter the law in that point. The question, then, really is, from what time this will operated.

Nothing appears in the probate of the will to show, that the Court of probate undertook to determine that question; and, as far as it is stated, it was proved as a will speaking in respect of the land from its date, and not by force of a republication. In the case of *Jiggetts* v. *Maney*. 1 Murph. 258, it was held that a will of this kind, unattested and written by the testator and deposited among his valuable papers, did not operate from his death, but from its date. It was strongly argued, that, as the date was an immaterial part of an instrument, the publication was to be referred to the period at which the will became of force. But the Court thought, that the publication was to be referred to its date, and that the preservation of it by the testator among his valuable papers was not a republication of it from day to day as long as he lived, but only the recognition of it as a subsisting will, in the same manner as his keeping it would be regarded, if it had been an attested will. The same principle seems to apply with equal force to what was done in this case—if that question now be open for the decision of the Court, as we suppose it to be. We do not mean to say, if a testator deliver his holograph will of a prior date to a person, for safe keeping, in such terms as show an intention, that it shall speak as a will from that time, that such acts and declarations may not amount to a publication or republication then. How that would be, we do not at

present undertake to consider, though we suppose it would amount to publication. But we conceive, that if a publication can be thus shown, there must be a plain expression of purpose, that what is then said and done should be a republication; by which we mean, that the party meant the instrument to operate as an instrument of that date, and not of that which it leave upon its face. It requires strong proof of the intention, because it is in apparent conflict with the instrument itself, which he is taking the means of preserving in its original form, and which, therefore, it is to be supposed, *prima facie*, at least, he meant to operate according to its form. Here the case states simply a delivery by the testator to another person of a number of valuable papers for preservation during an absence of uncertain duration in a distant country, and that among these papers was this will. But it does not seem, that a single word was said of the will in particular, or that the friend ever knew, that one of the papers was a will. It was in truth nothing more than a mode of preservation of conveyances, securities, and this will in the strong box of a friend, instead of his own, and is barely a recognition of the papers as a subsisting will, without any reference to the time from which its subsistence was to be reckoned, but leaving it to speak for itself on that head. It is no more a republication of this, than it would have been of an attested will. No doubt a codicil would be a republication, and, if that had been executed according to the act of 1784, in either way, it would have had that effect. But that would be an act of an explicit character; though it was once much contested, whether a codicil would be a republication of a previous will. In the case here, there is nothing whatever, by which more can be collected, than that the party treated this paper as a will in 1847; but, without something more, it must be taken that he treated it, not only as then being so, but

as having been so from the time he made it. If it had been without date, it would, necessarily, be otherwise; but as it is, the Court holds, that the instrument is, as a will of lands, to be referred, as to the period from which it operates, in respect of its publication merely, to the date of it.

It was further contended for the defendant, that the case is governed by the 3rd section of the Act of 1844, which enacts, that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. The rule of construction laid down by the statute is clear enough; but still it remains to be ascertained, to what wills it is to be applied. Undoubtedly, it has no application to wills before consummated by the death of the maker. The Legislature did not mean to touch vested rights by changing the meaning, which the law gave to an instrument at the time it was executed and went into operation. The question is, whether it was intended to change the meaning and legal effect of a provision, from what it was, when it was made, into something else, because the party lived to the time at which the Legislature said that such provisions have a meaning different from that imported by the instrument at its inception? We conceive that it was not so intended; and that the construction there prescribed applied only to wills thereafter to be executed or published. The case of *Salter* v. *Bryan*, 4 Ired. 494, it is true, is not an authority in point, because the statute, on which the question then arose, used the words, "made after" such a day. But that only made the point the clearer, because it expressed what, upon all just rules of interpretation, would be implied without it. It is true, that in *The matter of Elcock's will*, 4 McCord 39, it was held that a will executed properly, according to the law existing at its execution, is not good, unless, it

be also in the form prescribed by the law existing at the death of the maker, and that decision is noticed without disapprobation in the opinion given in the case in this Court. But that was merely an incidental remark, accompanying the observation, that the case was distinguished from that before the Court, inasmuch as our statute used the words "made after," while that in South Carolina did not. We had no concern with that case then, except to distinguish ours from it. But upon an examination of that case, we own the reasoning does not satisfy our minds, and that both on principle and authority we adopt the opposite conclusion. The English Statute of Frauds enacted, that "from and after the 24th of June, 1677, no action shall be brought to charge any person upon any agreement, &c., unless such agreement be in writing;" and in another section it enacted in the same words, that "from and after the 24th of June, 1677, no devise of land should be good, unless," &c. An action was brought after the statute upon a parol agreement before the statute, and it was held that it would lie; for, although the power of the Parliament extended that far, the Court said, it would not be presumed, that the Act had a retrospect to take away an action to which the plaintiff was entitled; and the Court went on to say "if a will had been made before the 24th of June, and the testator had died afterwards, yet the will had been good, though it had not been in pursuance of the statute." *Gilmore* v. *Shooter*. This case is reported in 2 Mod. Rep. 310, and by several other reporters of that day, and we believe, has never been seriously questioned in England. On the contrary, it has been approved and its principle acted on by HARDWICKE in several cases which arose under similar provisions in the Mortmain acts. *Atto. Gen'l* v. *Andrews*, 2 Ves. 224; *Ashburnham* v. *Broadham*, 2 Atk. 36; and *Atto. Gen'l* v. *Lloyd*, 3 Atk. We conceive that those decisions are precisely in point here. For, although the Stat. 29,

Charles 2nd fixes a time, June 24th, 1677, and ours is silent in that respect, yet it is precisely the same thing. Because the English Act does not say no will made after June 24th shall be good, but that after that time no devise shall be good, unless the will be written, signed by the testator, and attested as prescribed. It was therefore held in the manner it was, upon a principle of sound construction, as if the word "made" had been in the Act, because the Court presumed the Legislature had in view only such instruments as had their origin after the statute. Now, our Act, though upon its face it fixes no time expressly for the execution of the wills to which its rule of construction is to a pply, yet, by the general law, it is to be supposed to have in it a provision, that it shall operate thirty days after the rise of the Assembly; and with such a provision it would, in this respect, be exactly like the Stat. 29, Chas. II. There is another observation on the Act of 1844 that seems decisive of this question. The different sections are not so many independent provisions; but, being upon the same subject, they are to be construed together. Then if it is asked, for example, to what wills the rule of construction prescribed in the third section refers, it is plain, we think, that it refers to wills of the same kind, in respect to the period of their execution, as those spoken of in the preceeding parts of the act. Now, the first section authorises devises of certain interests not before capable of being devised, including real estate acquired subsequently to the execution; and the language of that section clearly makes it operate prospectively only. It is, "that it *shall* be lawful for any testator" &c; and "that the power, *hereby given, shall extend*" &c. In fine we are satisfied, that when a party used words, to which the law annexed a certain sense at the time they were used, it was not the intention of the Legislature to say, that, by the party's living to a certain day, it should be understood, that he

used them in a different sense. We think the enactment was altogether prospective; and, therefore, deem the judgment of the Superior Court erroneous.

PER CURIAM. Judgment reversed and *venire de novo*.

JOSEPH MARDREE & AL. vs. JOHN MARDREE.

A distributive share, accruing to a wife during the coverture, does not vest in the husband, but will survive to the wife, unless reduced into possession by the husband.

Where the wife is the sole next of kin and the husband the administrator, and the debts of the intestate are paid or assumed by him, and there are no reasons why he should hold any longer as administrator, the presumption is very strong that he held as husband, and consequently for himself.

Where there are other next of kin besides the wife, the husband being administrator, in order to entitle him to the property in his own right, he must appear by some act to be exercising a dominion over it, not according to his duty as administrator or in the discharge of functions of a representative character, but for his own benefit and as personalty the owner. Thus when the husband and the other next of kin, there being other funds for the payment of the debts, had agreed to employ the negroes, &c., on the lands of the intestate and at the end of the year to divide the proceeds of the crop among them "according to their rights as distributees;" *Held*, that this was a sufficient reduction into possession by the husband, to prevent any right of survivorship in the wife.

The cases of *Revel* v. *Revel*, 2 Dev. & Bat. 272, *Poindexter* v. *Blackburn*, 1 Ire. Eq. 266, cited and approved.

Appeal from the Superior Court of Law of Perquimans County, at the Fall Term, 1848, his Honor Judge BAILEY presiding.

Joseph Dail died intestate in January 1847, leaving a widow, Celia an only daughter and child, then the wife of Wilson Mardree, and also leaving a number of slaves, stocks of various kinds, which were on two plantations in Perquimons, where he had resided and died. One tract of the land belonged to him, Dail, in fee; and the other belonged to his wife in fee. Administration of his estate was taken in May 1847 by the son in law, Wilson Mardree. The intestate left cash and good bonds to the amount of nearly $1000, which was more than sufficient to pay the debts, and came to the hands of the administrator Wilson. Upon the death of the intestate, it was agreed between Mrs. Dail and Wilson Mardree, that the latter should sell nothing as administrator, but that they would keep the slaves and other personal property on the two plantations and plant and make crops thereon for that year on their joint account, and divide the crops in proportion to their distributive shares in the property. On the 9th day of August following, an instrument was drawn up by Wilson Mardree and executed by Mrs. Dail in the following words:

"Whereas Wilson Mardree has taken out administration upon the estate of my late husband, Joseph Dail, of which the only distributees are myself and the said Wilson in right of his wife Harriet, who is the daughter of the said Joseph: And whereas it was agreed between the said Wilson and myself to keep the personal estate together and to cultivate the lands during the present year: Therefore, know all men, that I, Celia Dail, do, for and in consideration of the premises, agree that the personal estate of the said Joseph shall be kept together and the crop that was planted at the death of the said Joseph, as well as that which was planted after his death, shall be cultivated for the benefit of the estate of the said Joseph; and that the proceeds of the crops, after paying expenses and charges, shall be divided between the said Mardree

and myself, according to our rights as distributees of the said Joseph Dail."

The plantations were managed by Wilson Mardree through the year 1847, until his death in the latter part of October. But he did not reside on either of the plantations; and Mrs. Dail lived on that on which her husband died. In November 1847, John Mardree obtained letters of administration on the estate of Wilson Mardree and also became administrator *de bonis non* of the first intestate, Dail. He sold the crops of 1847 and the stock and paid all the debts, and has a surplus of cash in hand of about $1500, after paying all the debts of Dail—being the proceeds of the stock and other chattels (except slaves) that had belonged to Dail, and of the said crops; and he has also in possession the slaves.

In September 1848, Mrs. Dail and Mrs. Mardree, the widow of Wilson Mardree, filed their petition against John Mardree, as administrator *de bonis non* of Joseph Dail for an account and distribution of the estate. The defendant insisted in his answer, that Mrs. Mardree owned no part of the slaves or other specific property left by her father, but that her slaves became vested in her late husband by force of his possession of the property and the use of it as his own. On the hearing, the Judge of the Superior Court was of that opinion and decreed accordingly; and Mrs. Mardree appealed.

Jordan, for the plaintiffs, submitted the following argument:

Though the precise question to be determined here has not been before the Court, there are undoubted principles and analogous cases, which establish the right of the wife to the possession of the property in dispute; and this depends upon the question of reduction into possession by the husband. This is a *sine qua non* to his right—a con-

dition, upon which alone, the law gives to him her choses in action.

Now, reduction into possession is a plain, legal, unambiguous phrase, denoting a specific act, attended with legal consequences; and no acts of an equivalent character, will, at law, produce the same effect. 2 *Kent.* 135. 1 *Russ.* 20. *Roper on Husband and Wife*, Vol. 1, 204.

The law leans to the right of the wife by survivorship, and, to defeat this right, the property must be altered. The acts of the husband must unequivocally show, that, he has elected to disaffirm the wife's right, and hold in his own. 5 *Johnson's Chancery Cases*, and cases cited; *Berry* v. *McCalister*, Conf. R. 100. As to what is a reduction into possession by the husband; see further, *Williams on Executors*, 1 vol. 557, and authorities there cited; *Roper on husband and wife*, 220, ut Supra.

Constructive possession of the wife's choses in action by the husband is not to be favored, so as to defeat her claim by survivorship. 11 *Seargent and Rawls*, 325.

Where husband died, before distribution made, it was held to survive: 1 *Dessausure*, 244, and the same rule was declared, where the husband had possession of the property, as executor. 2 *Call.* 447. *Hen. & Mur.* 214.

There must be some distinct act, indicative to elect to take as husband. 6 *Mur.* 64, and see 1st *Randolph*, 355. The case of *Elms* v. *Hughes*, 3 Dessausure 155, is decisive of this case. The widow, administered upon the husband's estate and married. The second husband took into his possession and use all the property, and kept it as his own up to his death. The contest was between the widow, as survivor, and the husband's administrator. Adjudged to the wife, upon the ground, that *partition between* husband and widow, and her first children, was necessary, to vest the property *in Elms as husband;* and until division, it was a right of action, and survived. The hus-

band's possession must be in the character of husband. 16 *Vesey* 413, 12 *Vesey* 497. The property must come under the *actual control and possession* of the husband—*quasi husband.* 12 *Kent.* 138 ; for marriage is only a qualified gift of the wife's choses in action. *Roper* 208.

Reduction into possession is confined to actual receipt; and he must not leave it in the State in which he found it. He must claim it as his own; deal with it as his own ; and exclude any vestige that he holds in his wife's right. 2 *Vernon* 707, also 180 *Stamper* v. *Barker* 5 Mad. 157, *Estate of Hinds,* 5 Whuton 158, 1 *Russ.* 20.

If the husband recovers judgment for the debt of the wife, and dies before execution, the wife is entitled. 3 *Atkins* 20, *Pre. Ch.* 415, 1 *Ch. Cases* 27, *Preston on Abstracts, &c.* 2 Vol. 348.

Husband seised of tithes in right of his wife, dies: the wife has the action for subtraction: but if the tithes be once set out and severed, they become a chattel, vested in the husband. *Williams on Executors* 554, and cases cited.

The mere intention to reduce them into possession, is insufficient. The acts must be such, as to change the property, and make the husband's absolute ; such as an award upon a judgment, &c.: therefore, a mere appropriation of the funds, will be unavailing. 5 *Vesey* 515. *Williams* 556.

And, the distinction between property coming to the husband, before and after marriage, no longer obtains. 9 *Vesey* 675. 10 *Vesey* 578. *Revel* v. *Revel,* 2 Dev. & Bat. 272. *Hardie* v. *Cotten & others,* 1 Ire. Eq. 61. *Poindexter* v. *Blackburn,* 286, *ut Supra.*

If the husband assign over the wife's bond, due to the wife ; this will not bind her. *Freeman* 241. *Pre. in Chancery* 121, 419. Or, if he takes it into possession, receives part principal, and all the interest, it survives.

Crash v. *Crash*, 1st and 2nd Vol. Mad. Chancery Reports 411.

The possession, and the right of property are inseparable. The husband in the case before us held it either as administrator, or, in his own right. The right of property could not be in one, and the possession in the other at the same time.

Now, the acts of the husband were his acts as administrator. He took possession as administrator—held as administrator; and to adopt them, and make them speak an election, on his part, to take as husband, and divest the wife's interest, would be, to give the instrument, between the distributees, a meaning foreign to its clear intent.

To make the agreement a reduction into possession, we must alter the doctrine laid down in the books; we must have recourse to a substitute; to something, which, shall be distinct from that, which has, hitherto, been regarded as a condition, in the completion of the husband's title.

But, in order to determine this question, divest the husband of his two-fold character. Suppose administration had been granted to John Mardree in the first instance, and the agreement had been executed in the same manner by the husband and Mrs. Dale; in whom would the right of property have been? Would that agreement have divested the administrator of his right? and who could have sued for a wrong done to the property? The administrator John, or the two distributees? Or, would he have held as their trustee? Surely, the administrator, when there were large debts hanging over the estate, would not expect such consequences to follow!!

Then in what better condition is the husband? The agreement is made for specific purposes, to wit: to prevent a sacrifice of the growing crop.

The intent is apparent, from the case as made up and agreement: for up to the day of the husband's death, he held the property as administrator, and kept it upon the lands of Joseph Dail, the intestate, and no division is spoken of as to the property of the intestate, except the corn; showing clearly, the husband did not intend to make the property his own, by that act; and after the crop was matured then to settle up the estate as administrator and sell the perishable part thereof. This view, further appears, from the fact, that the money and notes were kept distinct as administrator: and the administrator *de bonis non* received them as his intestate's, Dail's property; and thus made his returns—manifesting most clearly, how this agreement was interpreted by all those interested. The agreement sets out, and claims in right of his wife; and concludes, for the benefit of his intestate's estate.

The administratior Wilson, received the writing as a mere protection: for it appears, the other distributee only signed it—a part of the crop growing on her maiden land. While, the property remained in the same state, it was, when his intestate died, without division—the debts unpaid, and without *any claim of the husband to the same, as husband.* The agreement, though signed on the 9th of August, shows it was entered into long before; evincing the crop was the object in view, and thus to benefit the estate.

Separate the administrator from the husband, or, in other words, make them two distinct persons, and the agreement amounts to nothing; for all that can be said of it, it was to make the administrator a mere trustee; and according to the case of *Wall* v. *Thompson*, 16 Vesey 413, was not a reduction into possession, for it was made *diverso intuitu.*

The plaintiff particularly refers your Honors, to the case in 3rd *Howard's Mississippi Reports*, 307; *Scott* v. *James & others*; and to *the argument of counsel.* Also

to *Fonblanque Equity*, title, choses in action and notes 313. Also *Conference Reports* 100, The husband, could at no time, lay his hand on any piece of property, and say this is mine; and there is no evidence he ever dreamed of claiming, or regarded it as his own, and without this, there is no reduction. 2 *Black. Com.* 432.

Heath for the defendant, submitted the following argument:

If the question be an open one in this State, and the Counsel is not aware, whatever *obiter dicta*, may exist that it has ever been *directly* in judgment, then it is insisted, for the defendant, that chattles *accruing to the wife, during coverture*, vest, without any Act of the husband, at once, in him: for this position see the very able historical argument of Judge Whyte, 1 *Yerger's Tennessee Reports*, 413.

2d. The rule, that a reduction of a wife's chose in action, by the husband into his possession, as trustee, or in a fiduciary character, will not bar the claim of the wife surviving, refers to those trusts, where the husband expressly receives, and holds for the wife: possession as administrator, has been expressly held to be sufficient, to bar the claim of the surviving wife.

1 *Howard's Mississippi Reports*, 558, confirmed in *Magruder & Nichols* v. *Stewart's Adm'r*, 4 Howard, 204.

3d. Even if this were not so, and such reduction as administrator would not bar the wife surviving, then the agreement, between the distributees of Dail, is conclusive of the reduction into possession, and will bar her claim: it is an agreement, between them, *as distributees*, one of whom *is also administrator and assents:* it recites, that they are "the *only* distributees" of said Dail: that it hath been agreed between them, as such distributees, to keep the personal property together; to cultivate the crop;

and that "the proceeds of the said crop, after paying expenses, and charges, shall be divided between the said Wilson Mardree and myself, according to our rights, as distributees of the said Joseph Dail." This agreement is signed and sealed by one of the distributees, and handed to, and kept by the other; the one by giving, and the other by accepting and holding it, must be construed to have agreed to hold as distributees, and tenants in common, particularly as one of the distributees was administrator on the estate, and had in his hands, as the case shows, bonds, notes, and cash sufficient, to pay all the debts due from the estate. If authority be wanting to give this effect to the agreement, it can be found. *Lassiter & wife* v. *Turner, Administrator*, 1st Yerger, Tennessee Reports, 413.

4th. It would seem on principle, that in all cases, where the character of administrator and next of kin is combined in the same individual, any act done by that individual in relation to the property of the intestate, not plainly referable to his character as administrator, but which he might rightfully do as distributee, would be an election to hold as distributee, and not as administrator, in precisely the same way, and to the same extent, as a like act would vest a legacy in one as legatee, where the same person combines the two characters of legatee and executor, and as in the latter, so in the former case, this will be presumed, from slight circumstances, particularly where the property is not wanted to discharge the liabilities of the estate. Here the case and the agreement both show, that the administrator has done acts, which he had no authority to do as administrator, not referable to his character as such; but which he might rightfully do as distributee, and tenant in common with the other distributees; hence there was a reduction into possession by the husband, so as to bar the wife's claim as survivor.

RUFFIN, C. J. The Court is of opinion, that the decree was right and ought to be affirmed. A distributive share, accruing to a wife during the coverture, does not vest in the husband, but will survive to the wife, unless reduced into possession by the husband. *Revel* v. *Revel*, 2 Dev. & Bat. 272. *Poindexter* v. *Blackburn*, 1 Ired Eq. 286. When the administrator is some other person than the husband, it is generally not difficult to determine, whether the husband has or has not possessed himself of the share, or the things of which it consists, so as to charge the property, by extinguishing the wife's right and vesting it in the husband; for usually the share consists of money which the husband receives and for which he gives a receipt, or it consists of stock or specific things, which are divided and a share thereout allotted to the wife or the husband for her, and transferred or delivered to him. But we suppose it is not necessary, there should be an actual division between the next of kin, to enable the husband of one of them to take, and exclude the wife's right by survivorship. All that is requisite is, that the share should be got out of the hands of the administrator, as such, and should be held, either in severalty, or in common with others, as the husband's own. For, if, instead of a division of the property by the administrator and a delivery by him of the shares to the next of kin severally, it be agreed by the next of kin, that they will take the property from the administrator undivided, and the administrator accordingly give it up to all them together, then clearly the next of kin hold the things absolutely as their own property, and the husband of the next of kin is then to be regarded as in possession of his wife's share for himself and as his own property. For, it must be noted, that no act of the wife is necessary to vest her property in her husband, nor can she in any manner prevent it. The act is the husband's own; and, though he must reduce the chose into possession,

yet any act of dominion over it is sufficient, which shows that the husband undertakes to use or dispose of it, as his own presently, whether the possession be several as to one share, or jointly with some or all of the next of kin. When the title of the administrator becomes extinct, that of the next of kin is made absolute. But it is not, ordinarily, so easy to determine this question, when the same person is the administrator and the husband of one of the next of kin. Where the wife is the sole next of kin, and the debts of the intestate are paid or assumed by the husband, and there is no reason, why the husband should hold any longer as administrator, the presumption is very strong, that he held as husband, and, consequently, for himself. But, when there is another person besides the wife entitled to share in the estate, it would seem to require some unequivocal act on the part of the husband, who is the administrator, to terminate the title in himself as administrator and in his wife as one of the next of kin, and vest it in himself as husband. Yet, clearly, there must be some way in which it may be done; and we think it is not difficult to settle the principle, which will determine, whether the husband has done an act, which was meant by him, and in its nature is sufficient, to denote that he holds as husband, and thereby to terminate the title of administrator and merge his wife's right in his own. It is this, that he shall appear by some act to be exercising a dominion over the property, not according to his duty as administrator, or in the discharge of functions of a representative character, but for his own benefit and as personally the owner. For, unless that be sufficient, we do not perceive how the right can ever be vested in the husband except by a suit to which the wife is a party. Therefore, whenever the husband or the other next of kin divide the property, or they take it undivided and apply it to uses having no reference to the office of administrator and contrary to its

duties, but for the benefit of persons who are next of kin or in their right, it seems manifest that the possession is that of all the persons, who are next of kin, and not of that one who is administrator and in his representative capacity. If it be not so, what else could the husband do, which would more completely vest the possession in him as husband? Now, the husband here and Mrs. Dail contracted respecting this property as owners, saying that they are "the only distributees," and as such entitled to dispose of the property for their own benefit; and therefore they agreed that the slaves, instead of being sold or hired in course of administration, should work on the land belonging to those parties respectively, and that the profits should be divided in certain proportions between them. The administrator did not merely finish the crops planted by his intestate, but the parties in their own right planted other crops and employed the slaves and stock in their culture. It is true, the article says, that it should be for the benefit of the estate; but the meaning of that, it is obvious, was not to provide a fund for the purposes of the estate, as the payment of debts—since there were none, not already provided for, but it was to prevent either of the parties from claiming a greater share of the produce than in proportion to his or her share of the estate under the statute of distributions. For, immediately after saying, that it should be for the benefit of the estate, the article adds, "and the proceeds of the crops shall be divided between the said Mardree and myself, according to our rights *as distributees*." It seems to us, therefore, that this was as unquivocal an election by the next of kin and the husband to hold in their personal rights as they could, under the circumstances, have evinced.

PER CURIAM. Decree affirmed with costs.

THE STATE TO THE USE OF MOORE COUNTY vs. EVANDER McINTOSH & AL.

Notwithstanding the language of the private Act passed in 1835, relative to the County Trustee and Sheriff of Moore County, an action in the name of the State to the use of the County, will lie against the Sheriff for not collecting and accounting for the County taxes.

Although a sheriff is a defaulter when he is re-appointed, yet his re-appointment is not thereby void.

It is the duty of a sheriff to apply to the Clerk of the County Court in proper time for a certified copy of the tax list, and if he does not, neither he nor his sureties can avail themselves of the neglect of the Clerk to furnish such list.

A demand is not necessary, before action brought, for money collected by a sheriff for public purposes.

Appeal from the Superior Court of Law of Moore County, at the Fall Term, 1847, his Honor Judge CALDWELL presiding.

This is an action of debt, brought on the bond of the defendant, McIntosh, and his sureties, executed on the 16th of August, 1836, as sheriff of Moore County. Several breaches were assigned, but those mainly relied on, were for failing to collect and failing to account for the County taxes, imposed by the County Court of Moore at May Sessions 1836, for the year 1835, but collectable in 1836; the defendant, McIntosh, acting at the time in the double capacity of sheriff and County trustee, by virtue of a private Act. On the trial it appeared, that he had been sheriff from 1834 until 1839, and during that time had made several settlements with the Committee of Finance for Moore County. It also appeared, that the tax list was delivered to him in due time in 1836 by the Clerk of the County Court, but it was not signed or in any

way certified by him. It also appeared, that, on a settlement had with the Committee of Finance in 1837, the defendant, McIntosh, had collected a portion of the taxes under the tax list of 1836, but what amount does not distinctly appear. It also appeared, that, when he executed his bond in August 1836, he was a defaulter to some amount for the preceding years, but the default was made up by payments in 1837. It also appeared, that some time in 1841, and before the commencement of this suit, one Archibald Munroe, a member of the Committee of Finance, called on the defendant, McIntosh, and demanded a settlement on account of the balance in his hands, due the County for the years during which he had been sheriff, and that he would pay over the same to him or to the said committee.

Several objections were taken by the defendants to a recovery.

In the first place, it was insisted, that the County of Moore could not sue as relator on the bond in question, neither under the Act of 1793, nor by virtue of the Act of 1831: That the Chairman of the County Court of Moore was the proper relator, according to the provisions of the private Act of 1835.

In the second place, it was insisted, that as it appeared, that the defendant was a defaulter at the time he executed his bond in August 1836, the County Court was prohibited from taking said bond, and it was, therefore, void.

In the third place, it was insisted, that no tax list certified by the Clerk, or in any way authenticated by him, as a warrant authorising the collection of taxes, had been placed in the hands of the defendant, McIntosh, in 1836, or at any other time, and, therefore, the defendant and his sureties were not liable on the said bond.

And in the fourth place, it was insisted, that no demand had been made on the defendant by any person authorised to make one—that it should have been made by the

Chairman of the County Court or the succeeding sheriff.

These several objections were taken during the trial, but by consent of counsel were reserved; and a verdict was taken for the plaintiff, subject to the opinion of the Court thereon. On consideration, the Court set aside the verdict, and ordered a non-suit, and judgment being rendered thereon, the plaintiff appealed to the Supreme Court.

Strange, for the plaintiff.

Kelly, *D Reid*, and *Haughton*, for the defendants.

NASH, J. Several exceptions were taken in the Court below, to the plaintiffs right to recover in their action, which have been argued before us. We shall consider them in the order in which they are stated in the Bill of exceptions.

The first is, that the action cannot be sustained in the name of the County of Moore, but that it ought to have been brought in the name of the Chairman of the County Court, according to the provisions of a private act passed in 1835, respecting the County of Moore.

It is admitted, that under the general law, the action is properly brought, but it is contended, that under the private act of 1835, the action can only be brought to the use of the chairman of the County Court. As early as 1777. Rev. Stat. Ch. 29 sec. 1, the several County Courts within the State were empowered to appoint a County trustee, and among his duties was that of collecting all monies due their respective Counties. This is still the law in most of the Counties. In some, and Moore is among them, the law was altered, and a different system adopted. By the private act of 1835 it is provided, that the office of County trustee shall be abolished in the County of Moore, and the sheriff shall purform all his duties, "as are now prescribed by law," "and in all cases where suits are by

law directed to be brought in the *name* of the County trustee, such suits shall be brought in the name of the Chairman of the County Court." It is important to the decision of this exception, to ascertain in that *manner* the County trustee, at that time, was required to sue those who were indebted to the County. By the 3rd sec. of the act of 1777 the County trustee is required "to sue for, recover, and collect" from all persons all money, due his County, but no direction is given as to the person, in whose name it shall be brought. Nor is there any other public act, that we are apprised of, prescribing the form. At the time, then, the private act of '35 was passed, no law existed directing the trustee, in so many words, to sue in his own name for money due the County. In 1831, the Legislature passed an act, Ch. 31 sec 83, see Rev. Stat. Ch. 28, sec. 30, directing all suits to recover money due the County, to be brought in the *name of the State to the use of the County*. This was the law when the act of 1836 was passed. This latter act abolishing the office of County trustees was not repealed by the general Law of 1836 re-enacting that of '31, as there is an express provision in the 8th Sec. of the 1st Ch. of the Rev. Statutes that no private or local act shall be repealed by the 2 sec. of the same chapter. That act is in full force but does not affect the question here. The framers of the private act of 1835 were mistaken in supposing there was at that time any law directing the trustee to sue in his own name.

The second exception is, that at the time the bond was given, upon which this action was brought, and when the defendant was appointed sheriff, for the period embraced in it, he was a defaulter; and by the law of the State the Court was prohibited from taking the bond, and it was, therefore, void.

We do not feel the force of this exception. It is true, the Court is by the act of '36, Rev. Stat. Ch. 109, sec. 7,

required not to permit a person, who has been a former sheriff, to give the bonds required by law, or re-enter upon the duties of the office, until he has produced before them, a recept in full from every officer, to whom it is his duty to pay the public taxes. But the act is merely directory and no where declares, that, if such a bond is given, it shall be void. The consequences would be too serious both to the public and to private individuals. The officer in this case was admitted into the office and became the sheriff *de facto* and ought not to be permitted to take advantage of his own wrong. It is sufficient, however, to say, the law has not declared a bond, given by the sheriff under such circumstances, void.

The third objection is, that no tax list, certified by the Clerk of the County Court, or properly authenticated by him for the taxes of 1835, had been placed in the hands of the sheriff; and he, therefore, had no power to collect the taxes, nor were he or his sureties bound for them.

It is true the tax list, properly certified, is to the sheriff his warrant to collect the taxes, without which he cannot compel their payment. *State* v. *Woodside*, 8 Ired. 104. But he may receive the tax due from any citizen, for the latter may, by application at the clerk's office, ascertain, what he does owe, and if the sheriff does receive it, he does so officially, and both he and his sureties are liable for it on their bond. In this case the declaration contains two counts, one for not collecting, and the other for collecting and not accounting, and the case states he did collect some. It is immaterial on which count the verdict was given. It was as much his duty to collect as to pay over the taxes to the proper officer, and to enable him to do this, it was his official duty to qualify himself by applying at the clerk's office for a list of the taxes properly certified; and there is no evidence he made such application.

The fourth exception was for want of a demand before

the action was brought. The money, here collected, was public money, and for it no demand was necessary. It is a part of the official duty of the sheriff to pay over to the officer, authorised to receive it, all public money collected by him, at the times required by law. With the same propriety it might be held to be the duty of the public Treasurer to demand from the several sheriffs the public taxes collected by them.

PER CURIAM. Judgment reversed and judgment for the plaintiff on the verdict.

DEN ON DEMISE OF MARY ETHERIDGE *vs* JAMES M. FEREBEE.

A deed is acknowledged by husband and wife; two justices of the peace, thereupon take the private examination of the wife and report to the Court and the Court acts upon the report; *Held*, that the inference is irresistible that the two justices were members of the Court, appointed for that purpose, though no special order of appointment appears.

It is sufficient, if the certificate of the private examination of a *feme covert* states that upon such examination, she declared that she had voluntarily *executed* the deed, without saying that *she doth now voluntary assent thereto.*

If, upon the privy examination, the wife states, that though she was willing to convey when she executed the deed, yet she had changed her mind and was then unwilling; of course the assent of the wife could not be certified.

It is immaterial whether the acknowledgment or the private examination be first recorded.

The cases of *Joyner* v. *Faulcon*, 2 Ire. Eq. 386, and *Burgess* v. *Wilson*, 2 Dev. 307, cited and approved.

Appeal from the Superior Court of Law of Currituck County, at the Fall Term, 1848, his Honor Judge BAILEY presiding.

This was an action of ejectment. The plaintiff offered in evidence a deed from John D. Cook and Lydia Cook to Joseph Cowell, also a deed from Joseph Cowell to Alfred Perkins, and from Perkins to the defendant James M. Ferebee. It was proved, that the defendant was in possession of the locus *in quo*, and that Lydia Cook was dead, having had no child by John D. Cook. and that Mrs. Etheredge, one of the lessors, was the daughter and only heir at law of Lydia Cook by another husband. The sole question in the cause was, whether the examination of Lydia Cook was legal, so as to convey her title. The following is the only entry upon the Minute Docket at February Term 1837, in relation to the deed from Cook and wife to Cowell, to wit: "Deed from John D. Cook and wife, Lydia, to Joseph Cowel was duly acknowledged in open Court, and the private examination of the *feme covert*, taken in open Court and ordered to be registered," and it appeared at the opening of the Court, that C. Etheredge and J. Forbes, and one other, were Justices presiding, and the above entry was the minute order, and the minutes do not show that the above Justices were appointed to take the private examination of the *feme covert*.

The following is a copy of the probate, as it appeared on the back of the deed, to wit:

Currituck February Term 1837. Personally appeared before us privately and aside from her husband Lydia Cook, wife of John D. Cook, acknowledged that she assigned the within deed of conveyance to Joseph Cowell with her own free will and accord and without any compulsion of her husband John Cook and ordered to be registered.

(Signed,)

J. FORBES, J. P.
C. ETHEREDGE, J. P.

State of North Carolina, Currituck County, February Term 1837. This deed from John D. Cook and wife Lydia to Joseph Cowell was acknowledged in open Court and the examination of *feme covert* taken and ordered to be registered.

(Signed.)

J. W. HUGHS, C. C. C.

A verdict of the jury was rendered in favor of the plaintiffs subject to the opinion of the Court, whether the deed from John D. Cook and wife Lydia passed the title to the land from said Lydia, she being at the time one of the owners of the land.

The Court being of opinion that the deed of Mrs. Cook did not pass her title, by reason of the defect in the examination, gave judgment for the plaintiff.

The defendant appealed to the Supreme Court.

Heath, for the plaintiff, submitted the following argument:

The probate of the deed from Cook and wife is defective in many respects. It does not appear there was a *joint* acknowledgment: but if it be *implied*, then the privy examination is defective for the following reasons: 1st, for the reason, that the Commissioners, who took it, were not "*appointed*" by the Court; the minutes show no such appointment.

Second. For the reason, if they were so "*appointed*," it does not appear, that either of them was a "*member of the County Court.*" It is true, they are mentioned as being on the bench, *when the Court opened*; but this is no evidence they were there at the time the examination was taken; *Foster* v. *Dean*, 4 Hawks. 303; since, there are nine orders, between the opening of the Court and the entry in relation to the examination. The two Justices, therefore, were not "members of the Court;" and no others are authorised to take a privy examination.

Third. Had these Commissioners been appointed, and had they been "members of the Court," as Justices off the Bench certainly are not, then the examination would be fatally defective in this: the Act *requires* the *feme covert* should express, that "she doth voluntarily assent thereto;" that is, that she doth *now, at the time of the privy examination, assent* thereto; while the privy examination *on the deed* says, she acknowledged "she *assigned*" the deed. The Act requires *present assent;* the examination speaks of a *past* transaction; the Act requires her, to express *her assent* to the deed; the examination says, "she acknowledged she "*assigned*" the within deed," &c. Assent to a deed, and having *once "assigned"* it, are entirely different things, even if "assigned," can be made to mean, executed: the Act requires present volition; the term "assigned," refers to a past transaction, while the object of the Legislature seems to be, to give the wife a "*locus penitentiæ*" between the execution and examination. Hence, had she used the word "executed," instead of "assigned," the examination would be defective.

Fourth. The defects are not aided, but rather made more glaring by the minutes: for the minutes say, "the privy examination of the *feme covert* was *taken in open Court.*" The Clerk's certificate cannot overrule the minutes, but must be the result of, and governed by, the minutes: *Burgess* v. *Wilson*, 2 Dev. 308. Hence, here is a privy examination, *in open* Court, which is "an absurdity in terms." *Burgess* v. *Wilson, ut supra.*

No counsel for the defendant.

Pearson, J. If the deed, alleged to have been executed by Mrs. Cook, is valid in law to convey her estate, the plaintiff is entitled to recover. His Honor was of opinion, that the deed was not valid. We have come to a different conclusion.

It is objected to the probate of the deed, that it does not appear that the two Justices, who certified to the *feme covert*, were members of the County Court, or were appointed by the Court for that purpose.

The record shows that the deed was acknowledged in open Court by the husband and wife; and that a report was made to the Court, at the same time, by Forbes and Etheredge, two justices of the peace, as to the privy examination of the wife; and that, thereupon, the Court ordered the deed to be registered.

The County Court is held by the justices of the peace in the several Counties. Any three are sufficient to make a Court, and any justice has the right to go upon the bench, and be a member of the Court. Indeed, any justice, who is present in the Court room, and takes part in the proceedings of the Court, as one of the Court, *ipso facto*, is one of the Court.

A deed is acknowledged by husband and wife in open Court—two justices of the peace, thereupon, take the privy examination and report to the Court, and the Court acts upon the report. The inference is irresistible, that the two justices were members of the Court, appointed for that purpose. If they had taken the examination *officiously*, the Court would not have received their report and *acted upon it*. In this case the record shows, that the two justices, Forbes and Etheredge, were members of the Court, when the Court opened on that day, but it is not necessary to call that circumstance in aid of the conclusion, that they were members of the Court, appointed to take the privy examination.

The other objection is, that it appears from the report, that the justices examined the wife as to whether she *executed* the deed voluntarily, but it does not appear, that they examined her as to whether she *doth voluntarily assent thereto*—in other words, that the examination appears to have been as to a *past* act, whereas, it should

have been as to her *present* assent; and the idea is suggested, that the law intends to give the wife a "*locus penitentiæ*," between the execution of the deed and the privy examination; so that, although she *executed* the deed voluntarily, yet, she should be at liberty to change her mind before the privy examination.

The result of this objection is an argument against it; for several cases, in which the report of the examination is expressed, as it is in this case, have been examined by this Court, and all objections, supposed to be at all feasible, were raised, and many similar cases have, no doubt, occurred on the circuits. And yet, this idea has now been suggested for the first time. In *Joyner* v. *Faulcon*, 2 Ired. Eq. 386, the certificate made by Judge DANIEL is, "she acknowledged that she executed the within deed freely," &c. In *Burgess* v. *Wilson*, 2 Dev. 307, the certificate is, "she acknowledged, that she executed the deed of her own free will," &c., and although many objections were taken, the one, now under consideration, was not started.

The Act of Assembly gives no form, in which the certificate or report of the privy examination is to be made. It simply provides, that the Judge, or member of the County Court, shall privily examine the wife, "whether she doth voluntarily assent thereto"—that is, to the execution of the deed, which she had just before acknowledged in the presence of her husband. And it can make no difference, whether the judge or member of the Court, in making the certificate or report of the privy examination, uses words in the past or present tense; in truth, the past tense would seem to be most proper. In the provision made for taking the examination of the wife, who is sick, the words in the commission are in the past tense—"whether she executed the deed freely and of her own accord," &c. and it is probable, that from this circumstance, most of the judges and members of the Courts,

have fallen into the mode of expressing the certificate in the past, which is really the most natural manner of stating the fact, as the examination comes *after* the acknowledgement of the deed.

If upon the privy examination, the wife states, that although she was willing to convey when she executed the deed, yet she had changed her mind, and was then unwilling; of course, the assent of the wife would not be certified or reported.

The word "assigned" is used by the parties in this case instead of the word "executed." We think it immaterial. The former being used as synonymous with the latter.

So, it is immaterial, whether the acknowledgement, or the examination be first recorded. In *Joyner* v. *Faulcon*, before cited, the privy examination is written first, but it was held, "the certificate states a single transaction—all therein mentioned occurred at the same time, and it is immaterial what part of it is mentioned first in the certificate."

Per Curiam. Judgment reversed and a *venire de novo* ordered.

MEMORANDA.

At the late Session of the General Assembly, the Honorable *Richmond M. Pearson* was elected a Judge of the Supreme Court, in the place of the Honorable JUDGE DANIEL, deceased; and was also elected a Judge of the Supreme Court for the unexpired time of the Honorable WILLIAM H BATTLE, temporarily appointed by the Governor and Council, and who resigned on the 30th of December, 1848.

At the same Session, the Honorable *Augustus Moore*, who had received a temporary appointment as one of the Judges of the Superior Courts of Law and Equity, from the Governor and Council, was elected to the same office, but in a few days sent in his resignation.

At the same Session, the Honorable JOHN W. ELLIS was elected one of the Judges of the Superior Courts of Law and Equity, to supply the vacancy occasioned by the resignation of the Honorable AUGUSTUS MOORE.

At the same Session the Honorable WILLIAM H. BATTLE was elected a Judge of the Superior Courts of Law and Equity, to supply the vacancy occasioned by the promotion of JUDGE PEARSON to the Supreme Court Bench.

At the same Session BARTHOLOMEW F. MOORE, Esquire, was elected Attorney General of the State, having been previously appointed to that office by the Governor and Council, to supply the vacancy occasioned by the resignation of EDWARD STANLY, Esquire.

APPENDIX.

In the matter of a contested election before the Senate of the State, between Hugh Waddell, contestant, and John Berry, the returned member, the following resolutions were adopted by the Senate, and the following response made by the Supreme Court through the Chief Justice:

SENATE, *January* 17, 1849.

WHEREAS, there is a contested election depending before the Senate, in which the following questions of a Constitutional character arise, on the making a correct determination of which, the Senate feel great difficulty. Therefore—

***Be it Resolved*, That the said questions be respectfully submitted to the Supreme Court for their consideration, with a request that the said Court would furnish the Senate, as soon as practicable, their opinion on the same, viz:**

***Question* 1*st*. Is, or is not, the vote of a bargainor in a deed of trust, legal?**

Question 2nd. **Is, or is not, the vote of a Trustee under a deed of trust, legal?**

Question 3rd. **Is, or is not, the vote of a *cestui que trust*, legal?**

CALVIN GRAVES, S. S.

A true copy from the Journal of the Senate.

H. W. MILLER, *Clerk, Senate.*

COMMUNICATION FROM CHIEF JUSTICE RUFFIN

IN REPLY TO A

RESOLUTION OF THE SENATE.

Raleigh, January 18th, 1849.

SIR:

The Resolution of the Senate, passed on the 17th instant, requesting the Judges of the Supreme Court to furnish the Senate with their opinions on certain questions therein mentioned, touching the qualifications of persons to vote for members of the Senate, under the Constitution of this State, was laid before the Judges on the evening of yesterday.

Although not strictly an act of official obligation, which could not be declined, yet from the nature of the questions, and the purposes to which the answers are to be applied—being somewhat of a judicial character—the Judges have deemed it a duty of courtesy and respect to the Senate, to consider the points submitted to them and to give their opinions thereon. I am, accordingly, directed to communicate it.

Three questions are proposed, which are thus expressed:

"First. Is or is not the vote of a bargainor in a deed of trust, legal?

"Second. Is or is not the vote of a trustee under a deed of trust, legal?

"Third. Is or is not the vote of a *cestui que Trust*, legal?"

It is to be premised, that categorical answers to these enquiries could not be useful to the Senate, for want of the precision in the terms of the questions themselves, which is usual and requisite in legal discussions. For, neither the subject of the conveyance, nor the nature of the trusts, nor the estates of the bargainor and bargainee are specified. But, referring to the nature of the controversy before the Senate, as stated in the resolution, it is supposed that the case to which the Senate alludes is of this kind: That one entitled to at least fifty acres of land for life or some greater estate, conveys it by deed of bargain and sale to a trustee, to secure debts to other persons, with a power to the trustee to sell the estate, and out of the proceeds to pay the debts. Then, supposing the proper residences of the parties, the points are, whether the bargainor, the bargainee, or the creditor, and, if either, which of them, hath a right to vote for a member of the Senate.

The Judges would have been gratified to have heard, before forming their opinion, an argument on the part of the gentlemen concerned on opposite sides; and, if the matter of law, involved in the questions of the Senate, were deemed by them doubtful, they would have been obliged to defer their answer until the parties or their counsel could submit their views. But as the Judges, upon conference, have found that their opinions entirely concur, and that no one of them entertains a serious doubt upon the subject, they have felt safe, and that it was proper, to deliver their opinion at once, in order to remove the difficulty felt by the Senate in determining the pending contest, as far as their opinion can contribute to that end.

The questions depend entirely upon the proper construction of the second clause of the third section of the

first article of the amendments to the Constitution of the State. It is, that "all freemen, (except free negroes, &c.) who have been inhabitants of any one district within the State twelve months immediately preceding the day of any election, and possessed of a freehold within the same district, of fifty acres of land for six months next before and at the day of election, shall be entitled to vote for a member of the Senate." This language is precise and positive, that the right to vote belongs only to him who is possessed of a freehold. The first enquiry, then, naturally is, what is a freehold, and who is a freeholder, within the meaning of the Constitution?

The term, "Freehold," is a legal one, of very ancient use, and of known signification in the Common Law. It means an estate in land, of which a freeman is seised for the term of his own life, or the life of another, at the least. In its proper sense, it is restricted to such an estate at law. In reference to private rights, it is always used in pleadings and statutes, as applicable to legal rights and to legal rights only. It has likewise been used in the same sense, in reference to the qualifications of voters. Long before the settlement of the Colony of North Carolina, the right of voting for a member of parliament was limited, by an ancient Statute of England, to "Freeholders." A conclusive proof, that a freeholder, as meant in that Statute, was, as at Common Law, one who had the legal estate in himself, is furnished by the facts, that it required a subsequent Statute in that country to enable a mortgagor of a freehold estate, continuing in possession, to vote, and another to disable the mortgagee from voting, when he is not in the actual possession of the mortgaged premises or in the pernancy of the profits. So, by an Act passed in the year 1760, by our Colonial Legislature, substantially following a previous one of the year 1743, it was thought necessary or useful to define the term, "freeholder," as descriptive of one entitled to vote for Representatives; and therein it was provided, that a person who *bona fide* hath an *Estate Real* for his own life or the life of another, or *an estate*

of greater dignity, of a sufficient number of acres of land, should be accounted a "freeholder," and entitled, as such, to vote; and in a subsequent clause, it was further enacted, that the voter must be "possessed of a freehold within the meaning of that act"—that is, *an estate real* for life at least—"in fifty acres of land." It is, thus, easy to see, whence the framers of the Constitution, in 1776, and in 1835, derived the notion of the particular qualification of a freehold, and also the terms of its description. Certainly, the settled sense of the word "freehold," as a term of the law descriptive of an estate in land and in like manner as descriptive of a property qualification of voters, both in the mother country and in this Colony, is that, in which it must be received when used in the Constitution, when prescribing such a qualification for voters.

It may be thought by some persons, that, in favour of the elective franchise, the Constitution should receive an equitable interpretation, enlarging the term "freehold," so as to embrace also, what is called an "equitable freehold." But that instrument is to be fairly construed and received according to the plain and popular import of its language generally, or according to their legal sense when it uses technical legal terms. It is not to be crippled by a rigorous adherence to the letter, on the one hand, nor stretched out of bounds on the other, by a latitudinous construction of words of definite and well known signification. The very fact of requiring a property qualification repels all attempts to fritter it away upon a plea of favor to the citizen. The Constitution forbids any such favor, by the plain implication, that such a qualification is deemed indispensably requisite to the security of the citizens or the stability of the government: and its provisions in this respect ought no more to be enlarged, than restricted, by construction. Now "freehold" and "freeholder" are terms of art, of the definite signification in the law, hitherto mentioned, and therefore they ought so to be understood. It is true, that writers on that peculiar branch of our jurisprudence, which is called Equity, in

contradistinction to the common or statute laws, and also Chancellors, sometimes use the expression "equitable freeholder." But, in thus using it, they speak, not in a literal, but a figurative sense. They do not mean, that there really is a freehold in Equity; but only that one, who, in the view of a Court of Equity, is entitled in *præsenti* to the profits of land for life, of which another is seised, is to be regarded in that Court, to many purposes, as if he were seised of the land, instead of being entitled to the use and profits merely. But that refers solely to the beneficial rights of property *in equity*, in respect to the enjoyment, disposition, and transmission of the use by descent, or the like; and not at all to legal rights, or political privileges. To such rights and privileges the clause in the Constitution relates; and its terms cannot therefore be controlled by any peculiar sense in which a Chancellor might figuratively use them in reference to certain equitable interests, which, in some respects, have a similitude to freeholds in land, but are not really freeholds.

The foregoing considerations have so much weight in establishing the proposition, that a bargainor in such a deed of trust as that supposed, or a mortgagor, is not entitled to vote for a member of the Senate, that the Judges would entertain that opinion on those grounds, were there nothing else bearing on the point. But there are various other reasons, arising out of the purposes of the provision in the Constitution, and from the nature of such trusts and the rights of mortgagors, which strongly tend to the same result. Undoubtedly the object, in requiring the freehold qualification, was to constitute one branch of the Legislature peculiarly the guardian of property by having it chosen by the owners of property. To answer that end, the ownership of the property ought to be *bona fide* and substantial, and not colourable and covinous, or nominal merely. Then, it is to be observed, that debtors frequently mortgage their estates, or convey them in trust, as a security for debts to a greater amount

than the value of the land. In those cases they have such interests in the equity of redemption or resulting trust, that, while they continue in the possession and enjoyment of the land, they may be called "the equitable freeholders" in the Court of Chancery, though their estates, or rather, interests are, really of no value. It would be a gross abuse of the Constitution for such persons to vote; as they have neither a legal or beneficial property. That might, indeed, be otherwise, if the Constitution required a freehold of a particular value. In that case, possibly, the value of the land above the incumbrance might be deemed or declared to be the measure of the equitable freehold, as it is called. But there can be no such discrimination in this State. No act of the Legislature can add to the qualifications for voting or take any thing away. No law can now declare what is a freehold, so as to make it different from that described and meant in the Constitution. As, therefore, debtors, who convey their estates in mortgage or in trust to secure more than their value, cannot, in any just sense, or by any intelligent and upright tribunal, be deemed freeholders, to the purposes of the Constitution, and, as there is no power to create a distinction between such mortgages and deeds of trust and those in which the debts are less than the value of the estate; it appears to follow necessarily, that no mortgagor, or bargainor in a deed of trust of that kind, is competent to vote. For, as all cannot be admitted at the polls, none can: since they all have rights of the same nature, though of different values in the market, and the Constitution refers exclusively to the quantity of the land and the nature of the estate in it, without regard to value in any case.

Moreover, if persons, claiming equitable interests under express reservations or declarations of trust, were entitled to vote, so, in like manner, would those entitled by way of resulting or implied trusts. Thus, upon a contract for the purchase of a freehold, the vendor before a conveyance becomes a trustee for the vendee, and the

latter the equitable owner of the land, provided he has paid the purchase money or performed the contract on his part. But it seems quite clear, that it was not contemplated in the Constitution to make such nice and doubtful equities, as often arise out of such dealings, the subject of controversy at the polls, to be decided by the judges of the election. On the contrary, it was proper, that the title to vote should be defined clearly and rendered simple, so that the rights and duties of the citizen could be easily understood and readily determined. By viewing the Constitution in the legal and obvious sense of its language the right to vote is thus defined, and vested in the owner of the land for life—"the freeholder" —in possession.

The conclusion of the Judges is, and they are all of opinion, that the bargainor in such a deed of trust, as that supposed, is not entitled to vote for a member of the Senate, in virtue of any trust or interest in the land or in the surplus of its proceeds, after payment of the debts, reserved or resulting to him.

It follows, that a creditor, secured by such a deed, cannot, as a *cestui que trust*, vote for a Senator; for he has neither a legal nor an equitable right to the land, but only a right to have his debt raised out of it. Indeed, if a conveyance be made to one upon an express and pure trust for another for life, or any greater interest, the reasons already adduced upon the first point, satisfy the Judges, that the *cestui que trust* is not entitled to vote; because, in their opinion, merely equitable interests are not within the purview of the Constitution at all, but proper freeholds only.

Upon the remaining question as framed, namely: Whether the bargainee or trustee in such a deed be entitled to vote, the opinion of the Judges is likewise in the negative. Such a person is a freeholder; and if that by itself would suffice, he would be entitled to vote. But, by the words of the Constitution, one must not only have a freehold, but be "possessed" of it. That is a material,

and indeed, essential part of the provision. In legal language, "possessed" is not the appropriate term to describe the quantity of an estate, as being a freehold. Technically, he, who has a freehold, is said to be "seised," and we know thereby, that he is fully invested of the estate. "Possessed," then when applied to a freehold, means something more than that the party is seised for life; for such seisin is implied in the term "freehold," by itself. It can therefore only mean, that the person must be in possession of the land as his freehold. "Possessed," is therefore very properly applied to the term "freehold," in the Constitution—not as denoting merely, that a person hath a lawful right to the land, but further, that he is in the actual enjoyment by possession or perception of the profits, or, at least, that no one else is.

As has been already remarked, the policy of the Constitution is, that voters for members of the Senate should have a substantial interest in the country in the form of a freehold in, at least, fifty acres of land. Now, there may be such a freehold, which gives no beneficial interest to the freeholder; in whom the estate was vested for the use and benefit of another entirely. It is manifest that such a freeholder does not stand in such a relation to the property and the country, as affords a reasonable expectation, that he will exercise the elective franchise upon the motives and to the ends, for which the property qualification is required. A mere mortgagee, that is, one not in possession, has the estate barely as a security for a sum of money; and a trustee in the like condition holds the title exclusively for the benefit of others. It often happens, that the legal estate is outstanding in the trustee long after the debts are paid or other trusts are satisfied; in which cases the trustee cannot rightfully enter for any purpose, but is bound to reconvey the land upon request. If such a trustee were allowed to vote, it would plainly violate the policy and meaning of the Constitution, and not less, its language. If however a mortgagee take actual possession by himself or his lessees, he be-

comes thereby a freeholder in possession. Indeed, he has a substantial interest, as well as the estate, and is in fact enjoying it, and therefore his right to vote is unquestionable. It is not so obvious, that a trustee, in a deed to secure debts to others, is within the fair sense of the Constitution, though he take possession; and it can hardly be doubted that were the Constitution such an instrument as deals in details, such a trustee would have been expressly excluded, or, had the case occurred to the Convention, that to the words, "possessed of a freehold," would have been added "to his own use," or some provision of similar import. But the Constitution, in fact, contains no such qualification upon the right of the freeholder in possession to vote; and therefore though not plainly within the reason of the Constitution, a trustee, who is in possession, or in the actual receipt of the profits, though not to its own use, is fully within the express words of the provision in the Constitution as it is, and consequently he must be admitted to his vote. For there is no authority for a judicial or legislative interpolation of an exception, that the person must be "possessed to his own use," when the Constitution is not thus qualified, but is expressed in language, not in itself of doubtful import, but having a clear and settled sense.

The question of the Senate has no reference to the possession of the land by the trustee; and it must, therefore, be understood as referring to the right of a trustee to vote by force, merely, of the conveyance to him, vesting the legal freehold in him. Thus understood, the answer of the Judges to it is, that in their opinion, such a trustee is not entitled to vote.

But, at the same time, they deem it their duty to say further, that they are likewise of opinion, that if a mortgagee go into possession of the mortgaged premises or receives the profits, or if a trustee, in such a deed as that all along supposed, actually enter into possession or take the profits, for the requisite period, then the former, un-

doubtedly, and, in the opinion of the Judges, the latter also, is entitled to vote for a member of the Senate.

It will be observed, that the effect of these answers is, that, except when the trustee is in possession, neither the bargainor nor the trustee can be allowed to vote; and it may, possibly, occur to the minds of some, as an objection to the principles laid down, that the land is thereby excluded from representation altogether, and in so doing, that the Constitution is disregarded. But the objection, though it may at first appear plausible, has no real force. For the land is in no case represented. The right is in the owner. It is true, the right is conferred on him in respect of the land. But it is only for the security of his rights and interests as a citizen and owner of land; and he is not obliged by the Constitution to vote, or, after once acquiring the right to vote, not to part from it. The truth is, that there is a great deal of land on which no one votes or can vote: as, for example, that belonging to single women and infants, and to persons residing in a different district from that in which the land lies. So, if one conveys his land in such a manner as not to leave in himself a "freehold," he, of course, parts with his right to vote, though he continue to occupy the land. But it does not follow, that by depriving himself of that right, he transfers it to the alienee of the freehold. For, while the former owner cannot vote, for the want of the freehold, the new owner does not become entitled to vote by having the "freehold," unless he also become "possessed" of it. There is, consequently, no inconsistency in holding, that neither of them is entitled, when the trustee is not in posssession either actually or by receipt of the profits.

I am, sir, with very great respect,

Your most obedient servant,

THOMAS RUFFIN.

To the Hon. CALVIN GRAVES,

Speaker of the Senate.

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MEMORANDUM.

The Honorable RICHMOND M. PEARSON, one of the Judges of the Superior Courts was elected by the General Assembly, in December 1848, a Judge of the Supreme Court, to supply the vacancy occasioned by the death of Judge DANIEL.

The Honorable WILLIAM H. BATTLE, who had received the temporary appointment by the Governor and Council to the Bench of the Supreme Court, resigned that office in December 1848, and the Honorable RICHMOND M. PEARSON was elected to supply the vacancy thus created.

The Honorable AUGUSTUS MOORE, who had received from the Governor and Council the temporary appointment of a Judge of the Superior Courts was elected to the same office by the General Assembly in December 1848, and soon after resigned it, upon which the Honorable WILLIAM H. BATTLE was elected to succeed him.

The Honorable JOHN W. ELLIS was elected to the office of Judge of the Superior Courts by the General Assembly, in December 1848, to supply the vacancy occasioned by the promotion of the Honorable Judge PEARSON.

The Honorable BARTHOLOMEW F. MOORE, who had received from the Governor and Council the temporary appointment of Attorney General, was elected to the same office by the General Assembly in December 1848.